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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~701~~ 287

THE ST. JOSEPH AND ST. LOUIS RAILROAD COMPANY, APPELLANT,

vs.

SOLON HUMPHREYS AND THOMAS E. TUTT, RECEIVERS OF THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED NOVEMBER 2, 1888.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 9, 1891.

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1 *Stipulation as to Record.*

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

THE CENTRAL TRUST COMPANY OF NEW YORK and JAMES CHENEY, Complainants, *vs.* WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY and Others, Respondents.	Consolidated Cause. Nos. 2357 and 2464. In Equity.
THE ST. JOSEPH AND ST. LOUIS RAILWAY COMPANY, Intervenor.	

In the matter of the intervening petition and supplemental intervening petitions of the St. Joseph and St. Louis Railroad Company, praying for an order on the receivers to pay the sum due said petitioner as rentals under the lease from said petitioner to the St. Louis, Kansas City and Northern Railroad Company, being sub-Exhibit F No. 18, filed by the original complainant, The Wabash, St. Louis and Pacific Railway Company, as an exhibit to its amended bill of complainant herein.

Now come the St. Joseph and St. Louis Railroad Company and the Wabash, St. Louis and Pacific Railway Company, the Central Trust Company of New York and James Cheney, trustees, and James F. Joy, O. D. Ashley, Thomas H. Hubbard, and Edgar T. Welles, trustees, and sometimes styled "purchasing committee," and, for the purpose of simplifying the record in the above-entitled matter and saving the copying in full of the record in the above-consolidated cause, stipulate and agree that the following abstracts and recitals of the record and proceedings in said consolidated cause are true and correct statements of said record and proceedings so far as the same pertain thereto, and may be taken and accepted by the Supreme Court of the United States in the hearing of the appeal from the final decree in said intervention as of the same force and effect as if said records and proceedings were fully and at length embraced in the transcript of appeal herein. But these ad-
2 missions are without prejudice to either party in any other proceedings or on any other occasion, and are for the purpose of this suit only; and either party to this proceeding may, for the purposes of such appeal, bring up and insert in and as part of such abstracts and recitals any other part of the record in the said consolidated cause that he may deem material.

PATTISON & CRANE,
Attorneys for St. Joseph & St. Louis R. R. Co.
WELLS H. BLODGETT,
Solicitor for Solon Humphreys & Thomas E. Tutt, Receivers; the Central Trust Co. of New York and James Cheney, Trustees, and for the Wabash, St. Louis and Pacific R'y Co.

On the 25th day of November, 1884, said St. Joseph and St. Louis Railroad Company made application to the United States circuit court in and for the eastern district of Missouri, in which court said cause of The Wabash, St. Louis and Pacific Railway Company against The Central Trust Company of New York and others was then pending, for the payment to it of rentals claimed to be due from the receivers of said Wabash, St. Louis and Pacific Railway Company from March 1, 1884, to August 31, 1884, amounting to $30,517.31, together with a penalty of one-tenth of one per cent. a day, as provided by the terms of the lease of petitioner's road; and on the second day of January, 1885, said petitioner filed the following amended intervening petition, to wit:

Amended Intervening Petition.

In the Circuit Court of the United States, Eastern District of Missouri.

3 WABASH, ST. LOUIS AND PACIFIC RAILWAY CO.
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*

To the honorable judges of said court:

The St. Joseph and St. Louis Railroad Company respectfully represents to your honors that it is and was during and at all the periods and times hereinafter mentioned a corporation organized under and by virtue of the laws of the State of Missouri; that on the 17th day of March, 1874, it was the owner of a line of railroad extending from the city of St. Joseph, in the State of Missouri, to a point on the bank of the Missouri river opposite the city of Lexington, in said State, a distance of seventy-two (72) miles and nine hundred and thirty-six (936) feet, more or less; that on the first day of June, in said year 1874, your petitioner, said St. Joseph and St. Louis Railroad Company, lease- to the St. Louis, Kansas City and Northern Railway Company, a corporation likewise organized under the laws of Missouri, all its said railroad, together with all and singular the right of way for said road as then located and obtained and by it to be obtained, and also the right to construct and maintain along said route a railroad, as well as other rights, privileges, and franchises belonging to or pertaining to said railroad, and including its road-bed, made or to be made, its tracks, laid or to be laid, its stations or station-houses, depot grounds, rails, fences, bridges, and all other buildings or structures, as well as engine-houses and machine shops, and all engines, rolling stock, and other property appertaining to said railroad, whether real, personal, or mixed, and all the appurtenances to the above-described premises belonging or in anywise appertaining, for a term of ninety-nine (99) years from said first day of June, 1874; that by the terms of said lease said St. Louis,
4 Kansas City and Northern Railway Company, for itself, its successors and assigns, covenanted and agreed with your petitioner to well and truly pay or cause to be paid to your peti-

tioner, as and for the annual rent of said railroad property and the easements, franchises, and appurtenances thereunto belonging, besides the taxes, for the first and second years of said term, ten thousand dollars ($10,000.00) per annum; for the third, fourth, and fifth years of said term, thirty-five thousand dollars ($35,000.00) per annum, and for each subsequent year during said term thirty (30) per centum of the gross earnings of said demised railroad, said lessee guaranteeing that such percentage should in no year amount to less than twenty-five thousand dollars ($25,000.00).

And your petitioner further shows to your honors that it was further provided in and by said lease that in computing the gross earnings above mentioned for the purpose of ascertaining the amount to be paid by said lessee for annual rent as aforesaid your petitioner should be allowed for all passengers and freight carried over the demised road or any part thereof and the said St. Louis, Kansas City and Northern railway or any part thereof the same rate per mile as the latter road should be allowed for the portion of said latter road over which such passengers or freight should be conveyed, so that the demised road should always earn an equal amount per mile with the railroad of the lessee upon all the joint business, and in no case should any discrimination in rate of charges be made against the road of your petitioner so demised, and the local rates of charges for passengers and freight carried over the demised road should be the same as those on the St. Louis, Kansas City and Northern railway for similar distances and purposes; also that all the through passengers and freight of said lessee between St. Louis and St. Joseph should pass over the demised road, and that the charges received therefor should be included *pro rata* as aforesaid in estimating the gross earnings of the said demised road.

And it was further provided in and by said lease that all the rents so reserved as aforesaid should be paid by the lessee to your petitioner on the first day of each March and September during the term of said lease, and that after the first five years of said term the accounts of the gross earnings as aforesaid were to be rendered up to the first day of the preceding month, and that said lessee, when making payments of rant as aforesaid, should furnish to your petitioner a full, minute, and particular statement, verified by the oath of one of its officers, if required, of the gross earnings of said demised road for the period estimated as aforesaid, and your petitioner should have the right to examine the books and accounts of said lessee, its successors and assigns, in order to ascertain or verify the true earnings of the demised property.

Your petitioner further shows to your honors that said lessee, in addition to the rent reserved as aforesaid, covenanted and agreed to pay all lawful taxes of every kind and description, by whomsoever or in whatsoever manner, directly or indirectly, levied and imposed, upon the railroad property and effects demised as aforesaid, or the business done thereon, as well for the year 1874 as for all subsequent years during the term of said lease; and also covenanted and agreed that it, said lessee, its successors and assigns, would put the road-bed, culverts, bridges, station-houses, and all other demised

property in such order and repair at its own cost and charges as to enable the road to be safely and successfully operated, and would operate the same, keeping it in such order and condition during the term of said lease that it might be safely and successfully operated,
6 and would do all in their power to develop and increase the business of said road, and would furnish and supply, at its own cost, all engines, locomotives, cars, and other rolling stock which said demised road might require to do all the business which should be offered, and would continue to operate the same to its fullest extent during the entire term of said lease.

And your petitioner did in and by said lease warrant and defend the title of said demised property to said lessee, its successors and assigns, except as against tax liens.

It was also further provided therein and thereby that said lessee, its successors and assigns, should have the exclusive control and management of the operations and business of said railroad during the continuance of said lease, and should regulate and determine the rates of passage money, tolls, freight, and charges thereon, and the manner of operating the same, subject only to the provisions and stipulations contained in said lease and to the laws of the land, as fully as your petitioner could have done if said lease had not been made.

And it was provided that in case default should be made by lessee in the payment of the rents in said lease reserved and the same or any part thereof should remain unpaid for the space of 30 days from and after the day when the same became due and payable, or if said lessee should fail to comply with its covenants to pay taxes aforesaid and in all things to keep and observe all and every the covenants, stipulations, and agreements in said lease contained and on its part to be observed and kept, then it should be lawful for your petitioner to enter upon and take possession of all the leased property, together with all the improvements thereon constructed, and to have again, repossess, and enjoy the same as in the first instance, and upon such default in the payments of rents or taxes or the breach of any such
7 covenants as aforesaid said lease should cease, terminate, and be forfeited, at the option of your petitioner, provided that no breach of any of the covenants in said lease contained, except the covenant to pay rent, should occasion any forfeiture of said lease or give any right of re-entry unto your petitioner, — should have given to said lessee, its successors or assigns, or to the party in actual possession of said railroad, or any part thereof, a notice in writing, specifically mentioning the breach or breaches of covenant complained of and expressly notifying that if the same be not remedied with- the space of three calendar months from the date of such notice the lessor intends to re-enter upon the premises as forfeited, pursuant to the provisions of the lease; that in case no one should be in possession of said road, then such notice might be given by posting copies in triplicate thereof, one at each end of the terminal stations of said road and one at the intersection of the demised road and the road of the said lessee; and said lease contained the further provision that in case default should be made by said lessee

in the payment of rent, then said lessee should pay as a penalty, in addition to the rent due, a sum equal to one-tenth of one per cent. on the amount due for each day during such period of default until said lease shall become forfeited or the rent shall be paid.

And your petitioner shows your honors that said lease contained a further stipulation to the effect that your petitioner, its successors or assigns, should, at their option, be allowed to mortgage all or any part of the demised property, subject to the provisions of said lease; that such mortgage might be made to secure the bonds which your petitioner, its successors or assigns, might, from time to time, issue in such amount or amounts as they might deem proper, provided that such bonds should not exceed in the aggregate the sum of five hundred thousand dollars ($500,000.00); said bonds to bear date on or after the first day
8 of June, 1876, and to be payable at such time or times as your petitioner, its successors or assigns, should designate; and, further, that your petitioner, its successors or assigns, might at their option renew said bonds or any part of them from time to time in order to postpone the period of their final payment to a time subsequent to the termination of said lease, should they elect so to do, but that default in the payment of the principal of said bonds or any of them should not in any manner impair or affect the rights of said lessee, its successors or assigns, under said lease, and that the entire amount of interest on the bonds so issued should not exceed the sum of twenty-five thousand dollars ($25,000.00) per annum, the same being the minimum amount of annual rent in said lease reserved; and it was further stipulated that said lessee, its successors and assigns, should guarantee the payment of the interest on said bonds, as also on bonds issued in renewal thereof, not exceeding in amount the said sum of twenty-five thousand dollars ($25,000.00) per annum during the continuance of said lease from and after the date of their issue and until their maturity, and that said interest should be paid directly to the holders of said bonds out of the rents to accrue under the provisions of said lease at such place in the city of New York as should be from time to time designated by your petitioner, its successors or assigns, but that whenever your petitioner, its successors or assigns, should be entitled under said lease to more than said sum of twenty-five thousand dollars ($25,000.00) per annum, then such excess should be paid directly to your petitioner, its successors or assigns, or to such person or persons as it might direct; but your petitioner says that no bonds have ever been issued as above provided, nor any mortgage ever been executed thereunder, nor has your petitioner ever
9 availed itself of the privileges granted it by the last-mentioned stipulation of said lease; and, as your petitioner is informed and verily believes, there is no mortgage or incumbrance on your petitioner's said road except such as has been placed upon it by the said lessee or by its successors and assigns, as will be hereinafter fully shown and set forth, and except the lien for taxes for the year 1884, which said lessee, for itself, its successors and assigns, agreed to pay and satisfy.

And it was further stipulated in said lease that nothing therein contained should be construed or deemed to affect the right of continued corporate existence on the part of your petitioner or to affect any power or franchise the exercise of which might from time to time become necessary to protect the interests of its stockholders according to the true intent and meaning of said instrument; and your petitioner covenanted and agreed to exercise its corporate rights and franchises for the interest and protection of said lessee whenever the same should be proper and necessary to carry out the spirit and intent of said lease.

Your petitioner states that the above are all the stipulations and provisions of said lease which have any bearing on the questions nor brought before your honors for determination; but your petitioner states that the general provisions of said lease are set out in the amended bill of complaint filed by complainants in this cause, on pages 31 to 33 of said amended bill, and that a true copy of said lease is made an exhibit to said bill, and will be found in printed book of exhibits, on page 216, marked sub-Exhibit F No. 18; and your petitioner prays that said exhibit may be taken and considered as a part of this intervening petition as fully and to the same effect as if the same were set out at large herein.

Your petitioner further shows to your honors that after the
10 execution of said lease and after the said St. Louis, Kansas City and Northern Railway Company had taken possession of your petitioner's said railroad and other property thereunder and had been for some time operating the said road under said lease, to wit, in the month of November, 1879, a certain railroad corporation, organized and known as the Wabash Railway Company, become consolidated with the said St. Louis, Kansas City and Northern Railway Company under the name of the Wabash, St. Louis and Pacific Railway Company, and from thence hitherto said consolidated road has continued in existence under the said title, said company being the complainant in this suit; that the agreement for consolidation made and entered into by and between said two companies is set out in the aforesaid bill of complaint, and a true copy thereof is filed with said bill as an exhibit, beginning on page 370 of the printed volume of exhibits and being marked sub-Exhibit F No. 38; and your petitioner prays that the same may be taken and considered as a part of this petition as fully as if set out at large herein.

Your petitioner further shows that by the terms of said agreement of consolidation it is provided that, immediately upon the organization of the board of directors of the said consolidated company, all property, rights, and franchises, of whatever name or nature, belonging to the said companies so consolidated, or to either of them, should forthwith pass to and be vested in the said new corporation, and the two first-named corporations should thereupon forever cease and determine; and your petitioner shows that a board of directors of said consolidated company was duly elected and organized, and that thereupon said consolidated company, under the aforesaid name of the Wabash, St. Louis and Pacific Railroad Co., commenced to

operate both said roads composing the same, and has ever
11 since said time continued to operate them, and immediately took possession of your petitioner's said road and property so as aforesaid demised to said St. Louis, Kansas City and Northern Railway Company, and has ever since held and operated the same under the said lease; and said Wabash, St. Louis and Pacific Railway Company assumed all the covenants, agreements, stipulations, and obligations which were by the terms of said lease to be kept, performed, and assumed by the said St. Louis, Kansas City and Northern Railway Company, lessee therein, and obligated itself to keep and perform the same; but, as your petitioner will show to your honors, said consolidated company has failed to keep the covenants, agreements, stipulations, and obligations so by it assumed and undertaken.

And your petitioner further shows to your honors that after the aforesaid consolidation had been carried into effect and after the said consolidated company had taken possession of your petitioner's road as aforesaid, to wit, on the first day of June, 1880, said Wabash, St. Louis and Pacific Railroad Company, complainant herein, did on the first day of June, 1880, make, execute, and deliver to the Central Trust Company of New York and James Cheney a certain deed or indenture of trust and mortgage known as its "general mortgage," whereby it conveyed to said The Central Trust Company of New York and James Cheney, as trustees, all of the right of way and railroad of the said complainant herein, including the right of way, road, franchises, and other property of your petitioner held by said complainant under the lease hereinbefore mentioned and set out; that said mortgage purported to secure the payment of certain bonds therein mentioned and which were alleged to have been issued and sold by complainant; that said mortgage is fully set forth and described in the amended bill of complainant herein, as well as in the amended cross-bill filed in this case by said trustees, and a
12 true and correct copy thereof is annexed to and filed with the said amended bill of complaint and is marked Exhibit B; and your petitioner prays that said copy may be taken as a part of this intervening petition as fully as though the same were set out at large herein.

And your petitioner further shows that said trustees were made parties defendant to the bill filed herein by complainant, and that they have appeared and filed a cross-bill and amended cross-bill herein, and that in and by said cross-bills they claim that default has been made by said complainant in the performance of the stipulations and agreements in said "general mortgage" contained, and pray that the said mortgage may be foreclosed and for other and general relief in the premises; all of which will be more fully and at large appear by reference to said cross-bills, which are on file in this case.

And your petitioner further shows to your honors that on or about the 21st day of December, 1883, said complainant made, executed, and delivered to a corporation known as the St. Louis, Iron Mountain & Southern Railway Company a certain deed of mortgage cov-

ering all its lines of railway and all its property of every description whatsoever, including its right in and to your petitioner's road and property under the lease aforesaid, which said mortgage purported to secure the payment of certain bonds issued by said complainant, and also to indemnify the said mortgagee in respect to its alleged guaranty of said bonds and to secure the repayment of all moneys paid by said mortgagee for the benefit of said mortgagor or lent or advanced to said mortgagor by said mortgagee, and also to secure the payment of all debts to said mortgagee from said complainant; that said last-mentioned mortgage is set out and referred to in the said cross-bills of said defendants, The Central
13 Trust Company of New York and James Cheney, and a true and correct copy thereof is annexed to the said amended bill of complaint and marked Exhibit E, and the same is prayed to be taken and considered a part of this petition as fully as though it were set out at large therein; but your petitioner is entirely ignorant whether or not the said indebtedness mentioned and described in the said two mortgages above set out actually and in good faith existed or now exists, or whether any of the alleged bonds were ever actually and in good faith issued and sold or whether they are now held for value, or whether said St. Louis, Iron Mountain & Southern Railway Company ever guaranteed any bonds of complainant or ever paid any money for its benefit or ever advanced or loaned any money to complainant, or whether complainant is now in any way or on any account whatever indebted to said St. Louis, Iron Mountain & Southern Railway Company, or whether either of said mortgages was ever duly authorized or legally executed and issued.

And your petitioner shows to your honors that so far as it is informed or has any knowledge in respect thereto the mortgages above mentioned and described are the only mortgages now in existence affecting its said property.

And your petitioner further shows that it is informed and verily believes that said Wabash, St. Louis and Pacific Railway Company has acquired in the city of St. Joseph aforesaid extensive terminal facilities, and has purchased land for depots, freight yards, &c., at that point, and has acquired an interest in the union depot in said city, and that none of these terminal facilities are or will be of any use or advantage to said company complainant herein or to its creditors or mortgagees should it be deprived of the use of your petitioner's road and property held as aforesaid under the said lease.

And, further, your petitioner shows to your honors that while it is true, as above stated, that the said complainant took
14 possession of your petitioner's said property under said lease, yet it has by no means faithfully and properly kept and observed the covenants, agreements, and stipulations in said lease contained and by said lessee to be kept, performed, and observed; that among other stipulations which said lessee agreed to and which said complainant has failed to keep and observe is the provision that all the through passengers and freight of said lessee between St. Louis and St. Joseph should pass over your petitioner's road; that the taxes should be paid, and that the said railroad, its road-

bed, culverts, bridges, station-houses, and all its other property should be put and kept by lessee in such order and repair as to enable the road to be safely and successfully operated, and that lessee should and would do all in its power to develop and increase the business of said demised road and should operate the same to its fullest extent during the entire term of the lease. Your petitioner says that complainant has not sent its through freight and passengers over said demised road, has not paid the taxes thereon, and that it has utterly failed and neglected to keep said road, its bed, culverts, bridges, station-houses, and other property in good and proper repair, but, on the contrary, has suffered it to become grossly out of repair, its bridges to become weak, damaged, broken, and destroyed, its iron to become worn out, its rails to become broken and worn, its culverts and station-houses to become dilapidated, broken, and destroyed, and its whole property to be so much out of repair as to be unsafe and unfitted for proper use and to remain in such condition that it could not be safely and successfully operated; that as the result thereof there has been on said road great and unnecessary wreckage and destruction of rolling stock and property, and the expenses of operating the road have been largely and unduly increased.

And your petitioner further shows to your honors that though said lessee was bound by the terms and provisions of said
15 lease to do all in its power to develop and increase the business of said road and to operate it to its fullest extent, yet it has always failed and neglected so to do, and by failing to keep the same in repair and by turning business to other and rival roads and over other and rival routes and by failing to run trains on said road in the most advantageous manner and at proper times for the use and accommodation of the public it has diverted traffic from your petitioner's road and has largely diminished the earnings and receipts thereof, and has thus been guilty of gross violations of the covenants in said lease contained; but though said road has been, as stated, left in bad repair and condition and though proper efforts have not been made to develop and increase its business, yet said complainant has paid to your petitioner as and for rental under said lease, being 30 per cent. of the gross earnings of said road, the following sums, for the following years respectively, to wit:

For the year 1880 (including rental for the portion of the year 1879 after the date at which said consolidation took effect)	$42,505 13
For the year 1881	47,656 84
For the year 1882	42,133 31
For the year 1883	47,748 38
For the year 1884, up to March 1st thereof	24,530 66

Your petitioner further shows to your honors that Solon Humphreys and Thomas E. Tutt, who were appointed by your honors, in accordance with the prayer of complainant herein, receivers of said Wabash, St. Louis and Pacific Railway Company, took possession of said road as such receivers on the 29th day of May, 1884, and that

on said day said receivers also took possession of the road, property, rights, franchises, &c., of your petitioner, which had been demised as aforesaid and which were at the date of the appointment
16 of said receivers in the possession of and held and operated by said Wabash, St. Louis and Pacific Railway Company, and said receivers have ever since said 29th day of May, 1884, held, used, and operated your petitioner's said road and other property in and by said lease demised and under and by virtue of said lease and the powers therein contained, and said receivers are now using and operating said road and have recognized and adopted said lease and have elected to enter thereunder upon the premises therein demised and to avail themselves of the powers, privileges, and rights therein conferred upon said lessee.

Your petitioner further shows to your honors that on the 29th day of May of said year 1884, being the day on which the said receivers took possession of your petitioner's road as aforesaid, there had accrued as rental due under said lease, being 30 per cent. of the gross earnings of your petitioner's said road from March 1st, 1884, to said May 29th, the sum of $15,979.65, including therein $3,096.52, which was due for excess in the actual gross earnings of the previous six months over the earnings as estimated at the time the account for said six months was made up; that the gross earnings of said leased road from May 29th to September 1st, 1884, during the time said receivers had control thereof amount to $38,137.14; that there is due to your petitioner as rental for said period thirty per cent. of said sum, being $11,441.14, so that the entire rent due your petitioner up to the first day of September, 1884, and which should have been paid on said last-named date is $27,420.79, of which amount $11,441.14 has accrued during the time said receivers have been operating said road, and neither said Wabash, St. Louis and Pacific Railway Company nor said receivers have paid said overdue rent nor any part thereof, though the same has been often
17 demanded of them by your petitioner since said first day of September.

Not only have said company and the said receivers failed to pay the said accrued rent, but they have also failed and neglected to pay the taxes for the year 1884, and said taxes are now due and unpaid, and the same are a lien on your petitioner's said road and property. As to the exact amount of said taxes your petitioner is not informed, but from the best information available it believes them to be about the sum of eight thousand dollars ($8,000.00).

Your petitioner further shows to your honors that it is credibly informed and verily believes that the said road of your petitioner is absolutely necessary to the proper and profitable operation of the said Wabash, St. Louis and Pacific railway, and that the receivers not only did what was for the best interest of the said company and its creditors and mortgagees in assuming and carrying out said lease, but had they failed or refused so to do the value of the property placed in their hands by the decree of this court would have been greatly lessened, and their receipts therefrom in large measure diminished; that a much less number of passengers and a much

smaller amount of freight would have been transported over the lines of the said Wabash, St. Louis and Pacific railway than have actually been carried thereon had the receivers not had the use of your petitioner's road, for the reason that in no other way any by no other line could the passengers and freight of said Wabash, St. Louis and Pacific Railway Company have been transported to and from the city of St. Joseph, except by a very roundabout route, and then only over some connecting line or lines, in which case the freight money and passengers' fares received for such transportation must necessarily have been divided with such line or lines; in other words, without the road of your petitioner the said receivers
18 would possess no through line to St. Joseph.

Furthermore, from the knowledge possessed by petitioner and from credible information received, it verily believes and so states that, notwithstanding the failure by lessee to keep, observe, and perform the stipulations of said lease, as is hereinbefore fully stated, said leased road is a most valuable feeder to the main line of the said Wabash, St. Louis and Pacific Railway Company, and can be made still more so in the future; that your petitioner's said road runs through a very rich and fertile section of the State of Missouri and connects at the city of St. Joseph with other roads running through the best parts of Missouri and Kansas, and that the freight shipped over your petitioner's road destined for points on the main line of said Wabash, St. Louis and Pacific railway or for points beyond the termini of said road constitutes an important part of the total amount carried by said Wabash lines. There are at and near Richmond, a station on your petitioner's said road, valuable and extensive coal mines, producing an excellent article of coal, which is much used, not only by the inhabitants of the cities of St. Joseph and Kansas City and other cities in the western part of Missouri and the eastern part of Kansas, but also, as petitioner is informed, by the Missouri Pacific Railway Company, and said Wabash, St. Louis and Pacific Railway Company itself largely depends for its own supply of coal upon said mines; and your petitioner is credibly informed and verily believes that many thousands of car-loads of this coal are hauled over the road of your petitioner every year, and that said coal business might be largely increased.

Your petitioner further shows to your honors that it is credibly informed and verily believes that at all times since the execution of the aforesaid lease from your petitioner to said St. Louis,
19 Kansas City and Northern Railway Company the earnings of said last-named company, as well as of said Wabash, St. Louis and Pacific Railway Company, have always been more than enough to pay the interest on all the bonds of said St. Louis, Kansas City and Northern Railway Company which had been issued prior to the date of said lease, and which were in existence at that date.

And your petitioner shows unto your honors that there are certain allegations in said bills of complaint and in said cross-bills as to the truth of which your petitioner is entirely ignorant; that your petitioner has no knowledge nor any sufficient information to enable it to form a belief as to whether or not complainant issued its prom-

issory notes for the purposes in said bills and cross-bills stated, or whether such notes, if issued, were endorsed as alleged, or what amount of such notes were issued, if any, or whether any of such notes, if issued, now remain unpaid or were unpaid at the time of the filing of said bills or any of them, or whether said persons so alleged to have endorsed said notes were secured as alleged or in any way whatever, or whether any bonds known as "collateral bonds" or "collateral trust bonds" were ever legally issued, or, if issued, whether there was any, and, if so, what consideration for the same, or whether there existed at the time of instituting this suit or now exists any floating indebtedness of complainant, or whether complainant was then or is now insolvent, or whether there has been any default in the payment of any bonds or of any interest due by complainant, or whether any of its indebtedness remains unpaid; and your petitioner is also ignorant and possesses no information sufficient to enable it to form a belief whether any of the rolling stock of complainant is or was at the time of the institution of this suit held under conditional contracts of purchase, and, if so, what such contracts were or are, or whether complainant's road and
20 property were ever leased to the St. Louis, Iron Mountain and Southern Railway Company as alleged, or whether any such lease was ever duly and legally authorized and executed, or whether any deed of trust was ever executed as alleged to the Mercantile Trust Company of New York, or whether said defendants by whom said cross-bills have been filed were ever properly authorized thereto. As to all these allegations so far as they affect the interests of your petitioner strict proof is required.

Your petitioner represents to your honors that in justice and equity the rent now accrued and unpaid should be paid to it, together with the penalty provided in the lease, of one-tenth of one per cent. a day since the 1st day of September last; that the taxes for 1884 should be paid before the same become delinquent, since immediately upon becoming delinquent they begin to bear interest at the rate of one per cent. per month, and certain penalties and costs are added thereto, whereby the amount will be greatly increased. Wherefore your petitioner prays that an order be made directing said receivers to pay forthwith to your petitioner the amount of rent due as above mentioned, together with the penalty aforesaid, and that they be further directed to pay said taxes forthwith, and that they immediately proceed to put said leased property in thorough repair, where it has not already been done by them, and for such other and further relief as to your honors shall seem meet and just in the premises.

And, as in duty bound, will ever pray, &c.

By PATTISON & CRANE,
Their Solicitors.

The following is a copy of the lease, sub-Exhibit F No. 18, referred to in said intervening petition, except acknowledgements, which are in proper form:

21 SUB-EXHIBIT F No. 18.

This indenture, made and entered into this first day of June, A. D. eighteen hundred and seventy-four, by and between the St. Joseph and St. Louis Railroad Company, a corporation duly organized under the laws of the State of Missouri, party of the first part, and the St. Louis, Kansas City and Northern Railway Company, a corporation likewise organized under the laws of — State of Missouri, party of the second part, witnesseth:

Whereas the said party of the first part is the owner of the railroad situated in the State of Missouri heretofore known as the St. Louis and St. Joseph railroad, leading from the city of St. Joseph, in the said State, to a point on the bank of the Missouri river opposite the city of Lexington, in said State, a distance of seventy-two miles and nine hundred and thirty-six feet, more or less, together with all and singular the right of way for said road as now located, obtained, and by it to be obtained, and also the right to construct and maintain along said route a railroad, as well as all other rights, privileges, and franchises belonging to or pertaining to said road, and including its road-bed, made or to be made, its tracks, laid or to be laid, its stations or station-houses, depot grounds, rails, fences, bridges, and all other buildings or structures, as well as engine-houses and machine shops, and all engines, rolling stock, and other property appertaining to said railroad, whether real, personal, or mixed, and all the appurtenances to the above-described premises belonging or in anywise appertaining, free of incumbrance;

And whereas the party of the second part is desirous of acquiring the use of said railroad, together with all the rights, privileges, and franchises, appurtenances, real estate, and other property thereunto belonging, on the terms, conditions, and limitations and for the consideration hereinafter mentioned:

22 Now, therefore, this indenture witnesseth: That the party of the first part, in consideration of the rents, covenants, and agreements hereinafter mentioned, reserved, and contained, on the part and in the behalf of the party of the second part, its successors and assigns, to be had, kept, and performed, has demised, leased, and to farm-let, and by these presents does demise, lease, and to farm-let, unto the said party of the second part, its successors and assigns, the entire railroad of the said party of the first part, as above described, together with all and singular the real estate, rolling stock, and other property as above set forth, and also all the rights, privileges, franchises, and appurtenances incident thereto, as above more particularly described:

To have and to hold all and singular the above-demised railroad, premises, property, estate, and effects, including the rights of way, easements, privileges, and immunities aforesaid, unto the said party of the second part, its successors and assigns, from the day of the date hereof, for and during the full end and term of ninety-nine years, said party of the second part yielding and paying therefor

unto the party of the first part, its successors and assigns, rent at the rate and in the manner hereinafter provided.

And the said party of the second part, in consideration of the premises, hereby, for itself and its successors and assigns, covenants and agrees to and with said party of the first part, its successors and assigns, that it will well and truly pay or cause to be paid to said party of the first part, as and for the annual rent of said railroad property and the easements, franchises, and appurtenances thereunto belonging, as follows, besides taxes as hereinafter provided, to wit:

For the first and second years, ten thousand dollars per annum; for the third, fourth, and fifth years, thirty-five thousand
23 dollars per annum, and for each subsequent year during the term thirty per centum of the gross earnings of the demised railroad, the said party of the second part hereby agreeing and guaranteeing that said percentage shall in no year during the term (not including, however, the first five years) amount to less than twenty-five thousand dollars.

And it is expressly agreed and understood by and between the parties hereto that in computing the gross earnings above mentioned for the purpose of ascertaining the amount to be paid by the party of the second part for the rent of the demised road, its appurtenances, etc., the party of the first part shall be allowed for all passengers and freight carried over the demised road or any part thereof, and the St. Louis, Kansas City and Northern railway or any part thereof, the same rate per mile as the latter road shall be allowed for the portion of said latter road over which such passengers or freight shall be conveyed, so that the demised road shall always earn an equal amount per mile with the railroad of the parties of the second part upon all joint business, and in no case shall any discrimination in rate of charges be made against the road hereby demised, and the local rates of charges for passengers and freight carried over the demised road shall be same as those on the St. Louis, Kansas City and Northern railway for similar distances and purposes.

And it is further understood and agreed that all the through passengers and freight of the party of the second part between St. Louis and St. Joseph shall pass over the demised road, and that the charges received therefor shall be included *pro rata* as aforesaid in estimating the gross earnings of the demised road. All the rents reserved as aforesaid are to be paid by the party of the second part unto the said party of the first part on the first day of each
24 March and September during the term of this lease, and after the first five years the account of the gross earnings as aforesaid to be rendered up to the first day of the preceding month; and the party of the second part when making payments of rents as aforesaid shall also furnish the party of the first part a full, minute, and particular statement, verified by the oath of one of their officers if required, of the gross earnings of the demised road for the period estimated as aforesaid.

And the party of the first part, its successors and assigns, shall have the right to examine the books and accounts of the party of

the second part, its successors and assigns, in order to ascertain or verify the true earnings of the demised property.

In addition to the rent reserved as aforesaid the said party of the second part, in consideration of the premises aforesaid, hereby covenants and agrees to pay all lawful taxes, of every kind and description, by whomsoever or in whatsoever manner, directly or indirectly, levied or imposed upon the railroad property and effects hereby demised or the business done thereon as well for the year 1874 as for all subsequent years during the term of this lease, but the party of the first part assumes the payment of all taxes which accrued prior to the year 1874; and in addition to the rents reserved as aforesaid and the payment of taxes as aforesaid the said party of the second part furthermore covenants and agrees with the party of the first part that it, the said party of the second part, its successors and assigns, will put the road-bed, culverts, bridges, station-houses, and all other demised property in such order and repair, at its own cost and charges, as to enable the road to be safely and successfully operated at the earliest practicable day, and to operate the same, keeping it in such order and condition during the term of this lease and doing all in their power to develop and increase the business thereof, and to furnish and supply at its own cost all engines, locomotives, cars, and other rolling stock which the demised road may require to do all the business which may be offered, and to continue to operate the same to its fullest extent during the entire term of this lease.

And the said party of the first part, for itself, its successors and assigns, hereby covenants and agrees to and with the said party of the second part and its successors and assigns that it has full power and lawful authority to execute these presents, and that the said party of the second part, its successors and assigns, paying the yearly rents above reserved and performing the covenants and agreements herein contained on its part, shall and may at all times during the continuance of this lease peaceably and quietly have, hold, possess, and enjoy the railroad property, rights, and effects hereby demised, and every part thereof, without any manner of hinderance, trouble, or suit of or from the party of the first part, its successors and assigns, or any other persons whomsoever lawfully claiming the same, and that the title to the property herein demised it will warrant and defend unto the party of the second part for and during the term aforesaid against incumbrances and liens of any kind (tax lien excepted) made or suffered by the party of the first part or those under whom it holds or through whom it acquired title, and also against all suits in trespass and ejectment that may have been or that may hereafter be instituted in regard to the right of way along the line of said demised road as now located, it being the intention of this clause to warrant and defend the title to said demised property not only against the operation of any existing encumbrance or lien, but to save said party of the second part harmless from all costs and damages that may accrue against said lessee as occupant of said right of way.

26 And it is hereby mutually covenanted and agreed that the party of the second part, its successors and assigns, is to have the exclusive control and management of the operations and business of said railroad during the continuance of this lease and to regulate and determine the rates of passage money, tolls, freight, and charges thereon and the proper manner of operating the same, subject only to the provisions and stipulations in this lease contained and the laws of the land, as fully as the party of the first part could have done if this lease had not been made.

But in case default shall be made by the party of the second part in the payment of the rents herein reserved and the same or any part thereof shall remain unpaid for the space of thirty days from and after the day when the same shall become due and payable, or if said party of the second part shall fail to comply with its covenants to pay taxes aforesaid or in all things keep and observe all and every the covenants, stipulations, and agreements herein contained and on its part to be observed and kept, then it shall be lawful for the said party of the first part to enter upon and take possession of all the property hereby leased, together with all the improvements thereon constructed, and to have again, repossess, and enjoy the same as in the first instance, and upon such default in the payments of rent or taxes or the breach of any such covenants as aforesaid this lease shall cease, terminate, and be forfeited, at the option of the party of the first part:

Provided, however, that no breach of any of the covenants herein contained, except the covenant to pay rent, shall occasion any forfeiture of this lease or give any right of re-entry as above provided until the said party of the first part shall have given unto the
27 said party of the second part, its successors and assigns, or to the party in actual possession of the said railroad or any part thereof a notice in writing specifically mentioning the breach or breaches of covenant complained of and expressly notifying that if the same be not remedied within the space of three calendar months from the date of such notice the party of the first part intends to re-enter upon the premises as forfeited pursuant to the provisions of this lease; and in case no one shall be in possession of said road, then such notice may be given by posting copies in triplicate thereof, one at each end of the terminal stations of said road and one at the intersection of the demised road and the St. Louis, Kansas City and Northern railway.

It is also understood and agreed that in case *of* default in the payment of rent is made by said party of the second part, then such party of the second part shall pay as a penalty, in addition to the rent so due, a sum equal to one-tenth of one per cent. on the amount due, for each day during such period of default until said lease shall have become forfeited or the rent shall be paid.

It is furthermore understood and agreed that the party of the first part, its successors and assigns, shall, at their option, be allowed to mortgage all or any part of the property hereby demised, subject, however, to the provisions of the within lease; said mortgage may be made to secure the bonds which the party of the first part, its

successors or assigns, may, from time to time, issue, in such amount or amounts as they shall deem proper, provided that said bonds shall not exceed in the aggregate the sum of five hundred thousand dollars; said bond shall bear date on or after the first day of June, one thousand eight hundred and seventy-six, and shall be payable at such time or times as the party of the first part, its successors or assigns,
28 shall designate, and the party of the first part, its successors or assigns, may, at their option, renew said bonds or any part of them from time to time in order to postpone the period of their final payment to a time subsequent to the termination of the within lease, if they elect so to do; and it is expressly understood and agreed that default in the payment of the principal of said bonds or any of them shall not in any manner impair or effect the rights of the party of the second part, its successors or assigns, under the within lease. Said bonds shall have semi-annual interest coupons attached, which shall be due and payable on the first day of April and October of each year; but it is hereby stipulated and agreed that the entire amount of interest on the bonds so issued shall not exceed the sum of twenty-five thousand dollars per annum, the same being the minimum amount of annual rent hereinbefore reserved to be paid by the party of the second part, its successors and assigns, to the party of the first part, its successors and assigns, for the use of the property hereby demised; and it is hereby expressly stipulated and agreed that the party of the second part, its successors and assigns, shall guarantee the payment of the interest on the said bonds, as also on any bonds which may be issued in renewal thereof, not exceeding in amount the said sum of twenty-five thousand dollars per annum, during the continuance of the within lease, from and after the date of their issue and until their maturity, and said interest shall be paid directly to the holders of said bonds out of the rents to accrue under the provisions of the within lease, at such place in the city of New York, county and State of New York, as may, from time to time, be designated by the party of the first part, its successors or assigns; but whenever the party of the first part, its successors or assigns, shall, under the covenants and agree-
29 ments of the within lease, be entitled to more than the said sum of twenty-five thousand dollars per annum, then such excess shall be paid directly to the party of the first part, its successors or assigns, or to such person or persons as they may direct.

But it is especially understood and agreed that nothing herein contained shall be construed or deemed to affect the right of continued corporate existence on the part of the party of the first part or to affect any power or franchise the exercise of which may, from time to time, become necessary to protect the interests of the stockholders according to the true intent and meaning of this instrument, and the party of the first part covenants and agrees to exercise each and all its corporate rights or franchises for the interest and protection of the party of the second part whenever the same may be proper and necessary to carry out the spirit and intent of this lease.

Finally it is understood and agreed that this lease shall not be

assignable nor shall the demised premises or any part thereof be underlet to any one without the written consent in either case of the party of the first part, signed by its president and countersigned by its secretary and authorized by a resolution of its board of directors, and any attempted assignment of this lease or contract of subletting on the part of the party of the second part, without such written consent first had and obtained, shall work a forfeiture of this lease.

In witness whereof the respective companies hereto have caused this instrument to be signed in duplicate by their respective presidents and their corporate seals to be hereunto attached, attested by their respective secretaries, this first day of June, 1874.

[Seal of St. J. & St. L. R. R. Co., 1874.]

(Signed) A. KOUNTZE, *President.*
Attest: (Signed) NATH'L E. GOULDY, *Secretary.*

[Seal of St. L., K. C. & N. R. R., 1874.]

30 (Signed) WM. HOGE, *President.*
Attest: (Signed) JAMES F. HOW, *Secretary.*

The following is a copy of the agreement of consolidation of the St. Louis, Kansas City and Northern Railroad Company with the Wabash Railroad Company, omitting the acknowledgments, which are in proper form:

Agreement for Consolidation of the Wabash Railway Co. and the St. Louis, Kansas City and Northern Railway Co.

This indenture, made this fourteenth day of August, A. D. 1879, by and between the Wabash Railway Company, a consolidated corporation of Ohio, Indiana, and Illinois, of the first part, and the St. Louis, Kansas City and Northern Railway Company, a corporation of Missouri, of the second part, witnesseth:

That whereas the railway of the party of the first part extends from the city of Toledo, in the State of Ohio, through the State of Indiana, and thence into the State of Illinois to Meredosia, with branch of said road to Naples and East Hannibal, and from Meredosia to Camp Point, in the State of Illinois, and with branch of said road from Clayton to the east bank of the Mississippi river at Hamilton, in said State, and with branch of said road leading from Decatur, in said State, to East St. Louis, in the same State; and

Whereas the railway of the party of the second part extends from St. Louis, in the State of Missouri, in a northwesterly direction to Kansas City, Missouri, with a lateral extension from Moberly, in the county of Randolph, to Ottumwa, in the State of Iowa, and a branch from Salisbury, in the county of Chariton, State of
31 Missouri, to Glasgow, in the county of Howard, in said State, and also an extension from Brunswick, in said county of Chariton, in a northwesterly direction to the city of Council Bluffs, in the State of Iowa, which lines of railroad will when united form

one continuous line of railroad in the same general direction from the waters of Lake Erie at Toledo, Ohio, to the cities of Council Bluffs and Kansas City, on the Missouri river as aforesaid; and

Whereas it is considered to be for the advantage of both companies that the line of railway above described shall be united and consolidated, and be owned and worked in common; and

Whereas the capital stock of the party of the first part amounts to sixteen millions of dollars, divided into one hundred and sixty thousand shares of one hundred dollars each, all sharing alike, without discrimination or preference in the distribution of the earnings of its railway; and

Whereas the capital stock of the party of the second part amounts to twenty-four millions of dollars, divided into two hundred and forty thousand shares of one hundred dollars each, whereof twelve millions or one hundred and twenty thousand shares is known as preferred stock, the holders of which are entitled to a dividend of ten per cent. on its par value from the earnings of said railroad before any dividend whatever can be paid upon the remaining one hundred and twenty thousand shares, which last-named shares are known and designated as the common shares of said company; and

Whereas it is mutually considered and agreed by the parties above named that the aggregate value of two shares of the capital stock of the party of the first part is the same as the aggregate value of one share of the preferred stock and one share of the common stock of the party of the second part; and

Whereas it is intended and agreed that the terms of such
32 consolidation shall be exchange of shares in each of the said two first-named corporations for shares in equal number and amount of the consolidated corporation upon such conditions as shall duly observe and equalize the preference now vested in the holders of the preferred stock of the party of the second part by the issue to them of preferred shares of stock in the said consolidated corporation in equal number and amount, and also by the issue of preferred stock in the said consolidated corporation in due and like proportion to the holders of the capital stock of the said party of the first part:

Now, therefore, in consideration of the premises and of the several covenants hereinafter mentioned, by the party of the first part and the party of the second part, respectively, to be performed, it is hereby mutually stipulated and agreed:

First. The terms and conditions of this agreement shall be that from and after the consummation of this agreement and act of merger or consolidation by the corporations parties hereto and filing the same, duly certified, in the office of the secretary of state in each of the State hereinbefore mentioned the share or stock holders of the corporations parties to this agreement shall be share or stock holders respectively in the corporation hereby created and established, and upon presentation and surrender for cancellation, as hereinafter provided, of the certificates of shares so holden by them in either of the aforesaid corporations they shall have issued to them respectively

certificates for an equal number of shares in the consolidated company, distributed as follows:

For each two shares of the capital stock of the party of the first part the holder thereof shall receive one share of the common stock and one share of the preferred stock in said new corporation, each of the par value of one hundred dollars.

For each share of the preferred stock of the party of the
33 second part the holder shall receive on- share of the preferred stock of the said new corporation of the par value of one hundred dollars.

For each share of the common stock of the party of the second part the holder shall receive one share of the common stock of said new corporation of the par value of one hundred dollars.

Second. The mode of carrying this consolidation into effect shall be that upon the ratification of this agreement by the shareholders of either of the corporations parties hereto the shareholders thereof shall further appoint a time and place for the election of directors and other officers of the new corporation provided for by this agreement, which time and place shall be the same for both the parties hereto. All shareholders in either of said corporations parties to this agreement shall be admitted to vote at said election as shareholders in the consolidated corporation in person or by proxy, each share entitling the holder thereof to one vote.

The directors then chosen shall be the directors of the consolidated corporation, and immediately upon their organization shall assume, enjoy, and possess all powers, rights, and privileges now held or enjoyed by the board of directors of either of said corporations parties hereto, and thereupon forthwith all property, rights, and franchises of whatever name or nature belonging to the parties of the first and second part or either of them shall pass to and be vested in the said new corporation, and the two first-named corporations shall forever cease and determine.

Notice of the time and place of holding such elections shall be given by the secretary of each of the corporations parties hereto
34 by publication in some newspaper printed at the place where the general offices of each of said companies are situated at least three weeks previous thereto.

Third. The name of such new corporation shall be the Wabash, St. Louis and Pacific Railway Company.

Fourth. The number of directors of said consolidated corporation shall be fifteen, who shall be residents of the United States. They shall choose from their own number a president and first and second vice-presidents, and shall appoint such other officers as may from time to time be required. They shall have power to establish and amend by-laws, one of which shall fix the time and place for annual meetings of the consolidated corporation. The board first chosen shall hold office until the next annual meeting of the company, and all officers of the corporation shall serve during the pleasure of the board.

Fifth. The number and amount of shares of the capital stock of such corporation shall be four hundred thousand shares of one hun-

dred dollars each, whereof on--half or two hundred thousand shares shall be known and designated as preferred stock, the holders whereof shall be entitled to a dividend of seven per cent. per annum on their par value from the earnings of said consolidated corporation, but not cumulative, before any dividend whatever shall be paid upon the remaining two hundred thousand shares, which last-named shares shall be known and designated as the common stock of said consolidated corporation.

Sixth. The manner of converting the capital stock of each of said two first-named corporations unto that of the new consolidated corporation shall be that the present outstanding certificates of stock in the said two first-named corporations shall be surrendered to the president and secretary of the said new consolidated corporation, who shall thereupon issue and deliver to the person sur-
35 rendering such certificates new certificates representing equal number of shares in the said consolidated corporation, which shares shall — in each instance common or preferred according as the terms and conditions above mentioned may require.

In witness whereof the parties hereto have caused their respective corporate seals to be hereto affixed and the same to be attested by the signatures of their respective presidents and secretaries the day and year first above written.

For THE WABASH RAILWAY COMPANY,
[SEAL.] By CYRUS W. FIELD, *President.*
Attest: W. B. CORNEAU,
Secretary Wabash Railway Co.
ST. LOUIS, KANSAS CITY AND NORTHERN RAILWAY COMPANY,
[SEAL.] By B. W. LEWIS, JR., *President.*
Attest: JAMES F. HOW, *Secretary.*

NEW YORK, *October 10th*, 1879.

Whereas heretofore, to wit, on the fourteenth day of August, A. D. 1879, the board of directors of the St. Louis, Kansas City and Northern Railway Company entered into an agreement with the board of directors of the Wabash Railway Company, which agreement provided for the consolidation of the capital stock, property, and franchises of the two companies above named; and

Whereas in and by said agreement it is provided that the holder of preferred stock to be issued by said consolidated company shall be entitled to a dividend of seven per cent. from the earnings
36 of said company before any dividend shall be paid upon the remaining shares of said capital stock, but said agreement is silent as to the distribution of any surplus remaining from said earnings after a like dividend of seven per cent. shall have been paid to the holders of such common or remaining shares:

It is hereby mutually stipulated by the parties to said agreement and is declared to have been by them intended thereby that after the owners and holders of said preferred stock shall have received a dividend of seven per cent. upon the par value of their shares from the earnings of said consolidated company for any year they shall

receive no more from the earnings of said company for that year until a dividend of seven per cent. upon the par value of the common or remaining shares of said capital stock has been paid to the owners or holders thereof, and after that time all dividends shall be distributed alike among the holders of the preferred and common stock of said consolidated company.

In witness whereof the parties above named have caused these presents to be signed in their names by their respective presidents and have caused their corporate seals to be hereunto affixed and have caused the said seals and signatures to be attested by their respective secretaries the day and year above written.

THE WABASH RAILWAY COMPANY,
[SEAL.] By CYRUS W. FIELD, *President.*
Attest: W. B. CORNEAU, *Secretary.*
ST. LOUIS, KANSAS CITY AND NORTHERN RAILWAY COMPANY,
[SEAL.] By B. W. LEWIS, JR., *President.*
Attest: JAMES F. HOW, *Secretary.*

37 We, B. W. Lewis, Jr., president, and James F. How, secretary, of the St. Louis, Kansas City and Northern Railway Company, do hereby certify that the above and foregoing is a complete, true, and perfect copy of agreements heretofore made and entered into by and between the Wabash Railway Company, a consolidated corporation of the States of Ohio, Indiana, and Illinois, and the St. Louis, Kansas City and Northern Railway Company, a railroad corporation existing under the laws of the State of Missouri, for the consolidation of all the capital stock, property, rights, and privileges and franchises of said Wabash Railway Company with all the capital stock, property, rights, privileges, and franchises of said St. Louis, Kansas City and Northern Railway Company under the corporate name of the Wabash, St. Louis and Pacific Railway Company.

And we further certify that the agreements aforesaid were executed by us as president and secretary of said St. Louis, Kansas City and Northern Railway Company, and that we affixed the corporate seal of said company to said agreement, with the approval and under the direction of the board of directors of said St. Louis, Kansas City and Northern Railway Company.

In testimony whereof we have hereunto set our hands and affixed the seal of said corporation this eighth day of November, A. D. 1879.

[SEAL.] B. W. LEWIS, JR., *President.*

Attest: JAMES F. HOW, *Secretary.*

We, Cyrus W. Field, president, and W. B. Corneau, secretary, of the Wabash Railway Company, do hereby certify that the above and foregoing instrument of writing is a complete, true, and perfect copy of agreements heretofore made and entered into by and between the Wabash Railway Company, a consolidated corporation of the

States of Ohio, Indiana, and Illinois, and the St. Louis, Kansas
38 City and Northern Railway Company, a railroad corporation existing under the laws of the State of Missouri, for the consolidation of all the capital stock, property, rights, privileges, and franchises of said Wabash Railway Company with all the capital stock, property, rights, and franchises of said St. Louis, Kansas City and Northern Railway Company under the corporate name of the Wabash, St. Louis and Pacific Railway Company; and we further certify that the agreements aforesaid were executed by us as president and secretary of said Wabash Railway Company, and that we affixed the corporate seal of said company to said agreements with the approval and under the direction of the board of directors of said Wabash Railway Company.

In witness whereof we have hereunto set our hands and affixed the seal of said corporation this sixth day of November, A. D. 1879.

For THE WABASH RAILWAY COMPANY,
[SEAL.] CYRUS W. FIELD, *President.*

Attest: W. B. CORNEAU, *Secretary.*

Filed November 10th, 1879.

MICHAEL McGRATH,
Secretary of State.

Jefferson City, Mo.

On the 11th day of February, 1885, said receivers filed a demurrer and amended answer to said intervening petition, being in words and figures as follows, to wit:

Demurrer and Amended Answer of Receivers.

In the Circuit Court of the United States, Eastern District of Missouri.

WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, Complainant, *vs.* THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Defendants.	In Equity.

39 Demurrer and amended answer of Solon Humphreys and Thomas E. Tutt, receivers, &c., to the amended intervening bill of complaint of the St. Joseph and St. Louis Railroad Company.

These receivers, Solon Humphreys and Thomas E. Tutt, by protestation, not confessing or acknowledging any or all of the things in the intervenor's amended bill of complaint herein to be true in form and manner therein as alleged, demur to those parts of said bill which charges that the said complainant, The Wabash, St. Louis & Pacific Railway Company, has acquired in the city of St. Joseph extensive terminal facilities and purchased land for depot and

same under and by virtue of the order of the said court and pursuant to divers other orders from time to time had in said cause. These receivers admit that by virtue of the terms, provisions, and covenants of the lease of this intervenor to the St. Louis, Kansas City & Northern Railway Company there would be due to complainant on the 1st of September, 1884, the sum charged in said bill of complaint as rent. These receivers deny that the taxes on intervenor's line of road for the year 1884 remain due and unpaid; they charge the fact to be that they have fully paid and discharged all of the said taxes and have the receipt of the proper officers therefor.

43 These receivers, further answering said bill of complaint of the intervenors herein, and by way of exhibit to this honorable court of their doings, as they often have heretofore done by various reports from time to time in connection with the operation of the line of railway owned as aforesaid by the intervenor, respectfully show that from May 29th, 1884, to November 30th, 1884, inclusive, the gross earnings from the said railway of intervenor operated by these receivers was the sum of $84,281.18; that the total cost of operating the said railroad during the period last before mentioned was the sum of $135,461.27, including taxes for the year 1884; that the deficit and loss occasioned by the operation of the said railroad during the period last aforesaid amounted to the sum of $51,180.09. These receivers further charge that the business derived from the said railroad of the intervenor herein and accruing to the other branches of railroad operated by your receivers, pursuant to the general order hereinbefore referred to, during the period of five months last past was $66,269.86; that the net benefit to be derived from the said business so accruing to the other lines of railroad, as your receivers are informed and verily believe to be true, would be only forty per cent. of the said amount, or $26,507.94, so that these receivers say, excluding the matter of rents, that the operation of intervenor's railroad in connection with the operation of the other roads in the possession of your receivers, pursuant to the general order hereinbefore mentioned, incurs a daily heavy outlay far in excess of the income to be derived from the operation of said railroad of the intervenor.

Wherefore, in view of the premises, these receivers say that it would be manifestly unjust and inequitable to require them
44 to take the earnings and profits of other branches of the system of railway of the complainant herein and appropriate the same in the payment and discharge of the rents reserved and accruing to the intervenor herein to the manifest detriment and disadvantage of many creditors and mortgagees having indebtedness against the remainder of said system.

These receivers therefore pray to be discharged hence and to recover their costs herein expended.

SOLON HUMPHREYS & THOS. E. TUTT,
Receivers, &c.

H. S. PRIEST, *Solicitor.*

Demurrer of Receivers Overruled.

Said demurrer of the receivers was overruled, and thereupon, on the 21st day of February, 1885, said receivers filed an amended answer, being in words and figures as follows, to wit:

Amended Answer of Receivers.

In the Circuit Court of the United States for the Eastern District of Missouri.

WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY, Complainant, *vs.* THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Defendants.	In Chancery.

In the matter of the intervening petition of the St. Joseph and St. Louis Railroad Company.

Amended answer of Solon Humphreys and Thomas E. Tutt, receivers, etc., to amended intervening bill of complaint of the St. Joseph and St. Louis Railroad Company.

Solon Humphreys and Thomas E. Tutt, receivers, etc., for their amended answer to the amended intervening bill of complaint of the intervenor herein or to so much thereof as they are advised it is material for them to make answer unto, answering, say—

That they admit, so far as their interest as receivers aforesaid is concerned, the truth of all the averments in said amended bill of complaint, except the following and all matters thereto pertaining, which they deny, viz:

1. They deny that the complainant, The Wabash, St. Louis and Pacific Railway Company, has not sent its through freight and passengers over the demised road or has not paid the taxes thereon, or that it has utterly failed and neglected to keep said road and its bed, culverts, station-houses, and other property in good and proper repair.

2. They deny that the complainant, The Wabash, St. Louis and Pacific Railway Company, diverted traffic from the intervenor's said road or largely diminished the earnings and receipts thereof, or that it failed to do all in its power to develop and increase the business of said road or to operate it to its fullest extent by the means stated in said bill, or by any other means whatever.

3. They deny that they ever, since the 29th day of May, 1884, or at any time since, have held, used, or operated the intervenor's said road under *under* and by virtue of said lease or the powers therein contained, or that they have recognized or adopted said lease or elected to enter thereunder upon the said demised property.

4. They deny that the intervenor's said demised road is absolutely or in anywise necessary to the proper or profitable operation of the

Wabash, St. Louis and Pacific railway, and deny all the averments of said bill of complaint of intervenor thereto appertaining.

5. They deny that the intervenor's said road is a valuable feeder to the main line of the said complainant's road, and all the averments of intervenor's said bill of complaint thereto appertaining.

These respondents, further answering, say that, pursuant
46 to a general order of this court in that behalf duly entered in the principal cause, they, as receivers, did, on May 29th, 1884, take possession, control, and management of the intervenor's said railway without inquiry or knowledge by what right, contract, or lease the complainant herein had acquired the possession and management of the said road of intervenor.

These receivers, further answering said bill of complaint of the intervenor, and by way of exhibit to this honorable court of their doings, as they often have heretofore done by various reports from time to time, in connection with the operation of the line of railway owned as aforesaid by the intervenor, respectfully show that from May 29th, 1884, to November 30th, 1884, inclusive, the gross earnings from the said railway of intervenor operated by these receivers was the sum of $84,281.18; that the total cost of operating the said railroad during the period last before mentioned was the sum of $135,461.27, including taxes for the year 1884; that the deficit and loss occasioned by the operation of the said railroad during the period last aforesaid amounted to the sum of $51,180.09.

These receivers further charge that the business derived from the said railroad of the intervenor herein and accruing to the other branches of railroad operated by your receivers, pursuant to the general order hereinbefore referred to, during the period of five months last past, was $66,269.86; that the net benefit derived from the said business so accruing to the other lines of railroad, as your receivers are informed and verily believe to be true, would be only forty per cent. of the said amount, or $26,507.94, so that these receivers say, excluding the matter of rents, that the operation of intervenor's railroad in connection with the operation of the other roads in the
possession of your receivers, pursuant to the general order
47 hereinbefore mentioned, incurs a daily heavy outlay far in excess of the income to be derived therefrom.

Wherefore these receivers say that it would be manifestly unjust and inequitable to require them to take the earnings and profits of other branches of the system of railway of the complainant herein and appropriate the same in the payment and discharge of the rents reserved and accruing to the intervenor herein, to the manifest detriment and disadvantage of many creditors and mortgagees having indebtedness against the remainder of said system.

These respondents therefore pray the advice of this honorable court whether they shall longer continue in the operation and possession of said road, or as to whether they shall hereafter adopt or ratify said lease, made on the — day of ——, 188–, between said intervenor and said St. Louis, Kansas City and Northern Railway Company, or whether they shall deliver the same over to the intervenor herein, or, in the event the intervenor shall refuse to receive

it, they shall abandon the said road, and for such other orders and directions in the premises as to your honors may seem equitable and proper.

SOLON HUMPHREYS & THOS. E. TUTT,
Receivers, &c.,

By H. S. PRIEST, *Solicitor.*

On the 24th day of February, 1885, said petitioner filed its exceptions to a part of said last-mentioned answer of the receivers; which said exceptions were in words and figures as follows, to wit:

Exceptions to Part of Answer.

In the Circuit Court of the United States, Eastern District of Missouri.

48 WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, Complainant,
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Defendants. } In Equity.

In the matter of the intervening petition of St. Joseph and St. Louis Railroad Company.

Now this day comes the said St. Joseph and St. Louis Railroad Company and excepts to that part of the second amended answer of the receivers in said case which commences with the words "These receivers further answer said bill of complaint of the intervenor, and by way of exhibit to this honorable court of their doings," and including all the remainder of said amended answer, said portion so excepted to relating to the allegations of said receivers as to the gross earnings of said road and the total cost of operating same and the deficit and loss occasioned thereby, and as to the amount of business derived from the leased railroad and the net benefit derived from said business accruing to the other lines of railroad, and as to the excess of said expenses over the said benefits, also relating to the surrender of said road; and for ground of said exception intervenor says that the same constitutes no defence to the claim set up by intervenor in its petition, nor do the facts therein alleged, if true, constitute any reason why said receivers should not be ordered to pay the rents due and accrued under the lease in said intervening petition mentioned, nor why they should be allowed to surrender the said lease or cease to operate said road.

Wherefore intervenor asks that the part of said answer here excepted to be stricken out, and that it be not required to plead any further thereto.

By PATTISON & CRANE,
Its Solicitors.

49 *Exceptions to Part of Answer Overruled by Master.*

Said exceptions being submitted to the master were by him overruled, and petitioner duly excepted.

On the 13th day of March, 1885, the St. Louis, Iron Mountain and Southern Railway Company filed a demurrer to the intervening petition of petitioner; which said demurrer is in words and figures as follows, to wit:

Demurrer of St. Louis, Iron Mountain and Southern Railway Co. to Intervening Petition.

In the Circuit Court of the United States for the Eastern District of Missouri. September Term, A. D. 1884.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY, Complainants,
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Defendants. } In Chancery.

Demurrer of the St. Louis, Iron Mountain and Southern Railway Company to the intervening petition of the St. Joseph & St. Louis R. R. Co.

Said St. Louis, Iron Mountain and Southern Railway Company, by protestation, not confessing or acknowledging all or any of the matters and things in said intervening petition contained to be true in such manner and form as the same are therein set forth, doth demur thereto, and for cause of demurrer showeth that the said petition contains no matter of equity entitling the petitioner to the relief prayed for.

Wherefore, and for divers other defects and causes of demurrer appearing in the said intervenor's petition, said St. Louis, Iron Mountain and Southern Railway Company demurs thereto and humbly demands the judgment of this honorable court whether it shall be compelled to make any answer to the said intervening petition, and prays to be hence dismissed with its costs in
50 this behalf most wrongfully sustained.

THOS. J. PORTIS,
Att'y for St. L., I. M. & S. R'y Co.

I hereby certify that I have read the intervening petition of the St. Joseph & St. Louis R. R. Co. in the above cause, and that the above demurrer is, in my opinion, well founded in point of law.

THOS. J. PORTIS,
Att'y for St. L., I. M. & S. R'y Co.

STATE OF MISSOURI, *City of St. Louis,* } *ss:*

R. S. Hayes, of lawful age, being duly sworn, says that he is the 1st vice-president of the St. Louis, Iron Mountain and Southern Railway Company, and that the foregoing demurrer is not interposed for delay, but in good faith, for the causes therein set forth.

R. S. HAYES.

Subscribed and sworn to before me this 13th day of March, A. D. 1885.

[SEAL.] STEPHEN D. BARLOW,
Notary Public.

On the 7th day of February, 1885, the Central Trust Company of New York and James Cheney, trustees in the "general mortgage," filed their joint answer to said intervening petition; which said answer is in words and figures as follows, to wit:

Answer of Central Trust Co. of New York & James Cheney to Intervening Petition.

No. 2357. Clerk's No., —.

In the Circuit Court of the United States for the Eastern District of Missouri.

51 WABASH, ST. LOUIS & PACIFIC RAILWAY CO.
against
THE CENTRAL TRUST COMPANY OF NEW YORK *et al.* } Master's No., 50.

In re intervening petition of the St. Joseph and St. Louis Railroad Company.

Now comes the Central Trust Company of New York and James Cheney, trustees, by their attorneys, and for answer to the intervening petition of the St. Joseph & St. Louis Railroad Company say:

They admit the execution of the lease made on the 1st day of June, 1874, by the said St. Joseph & St. Louis Railroad Company to the St. Louis, Kansas City & Northern Railway Company, described in said intervening petition, and they admit that the terms of said lease as set forth in said petition are substantially correct, but for the full terms and particulars of said lease they hereby make reference to the same and to the exhibit thereof, as made in volume 1, on page 216 of the Substituted Volumes of Exhibits to the bill filed in this case, which is marked "Exhibit F" No. 18.

They also admit that after the execution of said lease and after the St. Louis, Kansas City & Northern Railway Company had taken possession of said intervenor's railroad, as alleged, that it became consolidated with the Wabash Railway Company, as alleged, and for the terms of the contract of consolidation between them they refer to said contract and to the exhibit thereof, beginning on page 370 of volume 1 of the Substituted Volume of Exhibits, marked "Exhibit F" No. 38; but they deny that said consolidated company, to wit, the Wabash, St. Louis & Pacific Railway Company, has failed to keep the covenants, stipulations, and obligations so made and undertaken by it.

52 They admit that on the first day of June, 1880, said Wabash, St. Louis & Pacific Railway Company, complainant in this cause, made, executed, and delivered to these defendants the general mortgage mentioned and described in said intervening petition, and

that said mortgage purported to convey the rights described in said intervening petition and to secure the payment of bonds mentioned therein, which bonds were issued and sold by the complainant, and they admit that a true and correct copy of said mortgage is annexed to and filed with the amended bill of complaint in this cause, marked "Exhibit B," and hereby refer thereto for the terms and conditions of said mortgage, and also as to the form and conditions of the bonds secured thereby.

They admit that these defendants as trustees were made parties defendant to the bill of complaint filed in this cause as alleged, and that they have prepared and filed a cross-bill and an amended cross-bill herein, and that therein they make the claim of default alleged in said intervening petition and pray that said mortgage may be foreclosed, and for other and general relief as alleged.

They further say that under said general mortgage dated June 1, 1880, there have been sold and issued seventeen thousand of the bonds secured thereby of the par value of seventeen millions of dollars, and that the remainder of said bonds secured by and described in said mortgage are held by these trustees under and by virtue of the terms of said mortgage and to be used in accordance with the provisions thereof.

They do not know and have no knowledge or information sufficient to form a belief as to whether the two mortgages described in said intervening petition are the only mortgages now in existence affecting the said property described in said intervening peti-
53 tion, and therefore they leave the intervenor to make such proof thereof as it may be advised.

They admit that the Wabash, St. Louis & Pacific Railway Company has acquired in the city of St. Joseph extensive facilities and has purchased lands for depots, freight yards, &c., at that point, and has acquired an interest in the union depot in said city; but they have no knowledge or information sufficient to form a belief whether those terminal facilities are or will be of any use to said company or its creditors or mortgagees should it be deprived of the use of said intervenor's road and property held under said lease, and they therefore leave said intervenor to make such proof thereof as it may be advised.

They deny that while it is true that said complainant took possession of the railroad described in said intervening petition under said lease that it has not faithfully and properly kept and observed the covenants, agreements, and stipulations contained in said lease, and deny that it has failed to keep and observe the provision that all the through passengers and freight of said lessee between St. Joseph and St. Louis should pass over said road, and deny that it has failed to keep the provision that the taxes should be paid; deny that it has failed to keep the provision that said railroad, its roadbed, culverts, bridges, and station-houses and other property should be put and kept by the lessee in such order and repair as to enable the road to be safely and successfully operated, and would do all in its power to develop and increase the business of said road and

operate the same to its fullest extent during the entire term of the lease.

They deny that said complainant has not sent its through freight and passengers over the said line of road; deny that it has not paid taxes thereon, and deny that it has utterly or otherwise failed and neglected to keep said road, its road-bed, culverts, bridges,
54 station-houses, and other property in good and proper repair, and deny that it has suffered it to become grossly out of repair, its bridges to become weak, damaged, broken, and destroyed, its iron to become worn out, its culverts, station-houses, to become dilapidated, broken, and destroyed, and its whole property to be so much out of repair as to be insufficient and unfitted for proper use, and to remain in such condition that it could not be safely and successfully operated.

They deny that as a result thereof there has been on said road great and unnecessary or other wrecks and destructions of railroad stock and property, and deny that the expenses of operating the road have been largely and unduly increased.

They deny that it has failed to do all in its power to develop and increase the business of said road and to operate it to its fullest extent.

They deny that it has diverted traffic from said road as alleged and largely reduced the earnings and receipts thereof, and that it has thereby been guilty of gross violation of the covenants contained in said lease.

That they have no knowledge or information sufficient to form a belief whether said complainant has paid to said intervening petitioner for rent under said lease the sums set forth in said intervening petition or any other sums, and therefore leave said intervenor to make such proof thereof as it may be advised.

They admit that Solon Humphreys and Thomas E. Tutt were appointed receivers of said Wabash, St. Louis & Pacific Railway Company, as alleged, and took possession of said road as such on or about the 29th day of May, 1884; and they admit that on or about said day said receivers also took possession of the property demised in said lease, as alleged, and that they have since that time held, used, and operated said road in and by said lease demised, and under and by virtue thereof, and that they are now using and operating
55 said road; that they have no knowledge or information to form a belief whether upon the day said receivers took possession of said demised road, or since, there was due or has accrued the alleged various sums of rental amounting to the sum of $30,517.31, nor whether the same still remains unpaid, nor whether the same has been demanded, as alleged, and they therefore leave said intervenor to make such proof thereof as it may be advised.

That they have no knowledge or information sufficient to form a belief whether said company or said receivers have failed to pay the taxes for the year 1884, as alleged, nor whether said taxes are now due and unpaid and are a lien on said road and property to the amount of $8,000 or any other sum, as alleged, and they therefore

leave said intervenor to make such proof thereof as it may be advised.

They have no knowledge or information sufficient to form a belief whether said intervenor is credibly informed and verily believes nor whether the fact be that the said road demised by said lease is absolutely necessary to the property and profitable operation of said Wabash, St. Louis & Pacific railway, nor whether the receivers did what was for the best interest of said company and its creditors and mortgagees in assuming and carrying out said lease, nor whether, — they failed to do so, the value of the property placed in said receivers' hands by the decree of this court would have been greatly lessened and their receipts therefrom in large measure diminished, nor whether a much less number of passengers and a much smaller amount of freight would have been transported over the lines of said Wabash, St. Louis & Pacific railway, as alleged, and they therefore leave said intervenor to make such proof thereof as it may be advised.

That they do not know and have no knowledge or information sufficient to form a belief whether said intervenor is
56 credibly informed and believes nor whether the fact be that said leased road is a most valuable feeder of the main line of the said Wabash, St. Louis & Pacific Railway Company, nor whether it can be made still more so, nor whether said road runs through a rich and fertile section of the State of Missouri and connects with other roads, as alleged, at the places as alleged, nor whether the freight shipped over said road destined for main points on the line of said Wabash, St. Louis & Pacific railway or for points beyond the termini of said road constitutes an important or other part of the total amount carried by the Wabash line, nor whether the coal mines, as alleged, exist or produce coal, as alleged, nor whether said coal is used, as alleged, nor whether many thousands or any carloads of said coal are hauled over the said leased road, as alleged, and they therefore leave said intervenor to make such proof thereof as it may be advised.

They have no knowledge or information sufficient to form a belief whether the earnings of said St. Louis, Kansas City & Northern Railway Company and of said Wabash, St. Louis & Pacific Railway Company or either or both of them have been at all times since the execution of said lease or at any other time sufficient to pay the interest on all the bonds of the said St. Louis, Kansas City & Northern Railway Company issued prior to the date of said lease and which were in existence at that date, and they therefore leave said intervenor to make such proof thereof as it may be advised.

They say they have no knowledge or information sufficient to form a belief whether there is any rent for said road now accrued and unpaid to said intervenors, nor whether, if so, the same should be paid by the receivers in this cause, and they therefore lease said intervenor to make such proof thereof as it may be advised,
57 but they deny that any penalty, as claimed by said intervenor, is due or should be paid to it for the time since the first day of September last or any other time.

And, having fully answered, they pray to be hence dismissed with their costs.

BUTLER, STILLMAN & HUBBARD AND
PHILLIPS & STEWART,
Attorneys for the Central Trust Co. of New York and James Cheney, Trustees.

Said intervening petition having been referred to the master for hearing, said master heard the evidence adduced by the respective parties, and on the 27th day of April, 1885, lodged with the clerk of said court his report, being in words and figures as follows, to wit:

Report of Master.

In the Circuit Court of the United States for the Eastern District of Missouri.

THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants, *vs.* THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.*, Defendants.	In Chancery. No. 2357, No. 2464, (Consolidated).
ST. JOSEPH & ST. LOUIS RAILROAD COMPANY, Intervenor.	Master's No., 50; Clerk's Nos., 251 & 306.

To the honorable judges of the United States circuit court for the eastern district of Missouri:

In pursuance of an order of reference to me of the petition of the St. Joseph & St. Louis Railroad Company, intervenor, which was filed on November 25th, 1884, I was present at the witness-room, in the Custom-House building, in the city of St. Louis, at 11 58 o'clock a. m. of Monday, December 15th, 1884, to hear the evidence, if any, relating to said petition, and the case was continued from time to time and testimony taken, as will appear from the record of proceedings herewith filed.

To the original petition the receivers filed a general denial.

On the second day of January, 1885, the intervenor filed an amended petition (clerk's number, 306), as to which amended petition the receivers filed a demurrer and answer (clerk's No., 367) February 11th, 1885, and the Central Trust Company filed an answer (clerk's No., 357) February 7th, 1885. The intervenor filed exceptions (clerk's No., 385) to parts of the answer of the receivers February 17th, 1885. The demurrer of the receivers and the exceptions by the intervenor to parts of the answer of the receivers were both overruled after argument. The receivers thereupon filed an amended answer (clerk's No., 393) to the amended petition. The St. Louis, Iron Mountain and Southern Railway Company filed a demurrer (clerk's No., 415) to the petition March 13th, 1885, which I recommend should be overruled.

The amended petition of the intervenor prayed for an order on the receivers to pay the rental accruing to it under the provisions of its lease original- made to the St. Louis, Kansas City & Northern Railway Company (exhibits, vol. 1, page 216) and assumed by the Wabash, St. Louis & Pacific Railway. As to the amount of rental called for by the terms of the lease there is no controversy, the same being thirty per cent. of the gross earnings of the railway of the intervenor. To September 1st, 1884, thirty per cent. of the gross earnings, remaining unpaid, amounted to $27,420.79. The intervenor also claims the penalty provided in said lease for non-payment, amounting to one-tenth of one percentum per day after September 1st, 1884.

59 The amended petition contains averments to the effect that the Wabash, St. Louis & Pacific Railway Company had acquired terminal facilities in the city of St. Joseph; had failed to keep the leased road in good order and neglected to develop and increase its business; had turned business over to other and rival roads; that intervenor's road was and is necessary to the proper and profitable operation of the property of the Wabash, St. Louis & Pacific Railway Company; that there are large and extensive coal mines on the line of intervenor's road; that the St. Louis, Kansas City and Northern Railway Company and the Wabash, St. Louis & Pacific Railway Company have always earned more than money enough to pay the interest on all the bonds which had been issued prior to the lease of intervenor's road. These are, in brief, the parts of the amended petition which were demurred to by the receivers.

That part of the answer of the receivers to which the intervenor excepted is the following:

"These receivers, further answering said bill of complaint of the intervenor herein and by way of exhibit to this honorable court of their doings, as they often have heretofore done by various reports from time to time in connection with the operation of the line of railway owned as aforesaid by the intervenor, respectfully show that from May 29th, 1884, to November 30th, 1884, inclusive, the gross net earnings from the said railway of intervenor operated by these receivers was the sum of $84,281.18; that the total cost of operating the said railroad during the period last before mentioned was the sum of $133,461.27, including taxes for the year 1884; that the deficit and loss occasioned by the operation of the said railroad during the period last aforesaid amounted to the sum of $51,180.09.

60 These receivers further charge that the business derived from the said railroad of the intervenor herein, and accruing to the other branches of railroad operated by your receivers pursuant to the general order hereinbefore referred to during the period of five months last past, was $66,269.86; that the net benefit to be derived from the said business so accruing to the other lines of railroad, as your receivers are informed and verily believe to be true, would be only forty per cent. of the said amount of $26,507.85, so that these receivers say, excluding the matter of rents, that the operation of intervenor's railroad, in connection with the operation

of the other roads in the possession of your receivers pursuant to the general order hereinbefore mentioned, means a daily heavy outlay far in excess of the income to be derived from the operation of said railroad of the intervenor.

Wherefore, in view of the premises, these receivers say that it would be manifestly unjust and inequitable to require them to take the earnings and profits of other branches of the system of railway of the complainant herein and appropriate the same in the payment and discharge of the rents reserved and accruing to the intervenor herein, to the manifest detriment and disadvantage of many creditors and mortgagees having indebtedness against the remainder of said system."

The demurrer of the receivers and the exceptions of the intervenor having been overruled, the evidence before me had reference chiefly to the averments thus retained in the pleadings.

It was claimed by the intervenor that the failure by the Wabash, St. Louis & Pacific Railway Company to keep the St. Joseph and St. Louis railroad in good repair prior to the appointment of the receivers was the occasion—

1st. Of large and extraordinary outlays by the receivers during the time they had had it in charge to operate it safely; and,

2nd. Of the meagre earnings of the property compared
61 with what they would have been had it been kept in good condition, and would be should the receiver hereafter continue to improve its physical condition.

It was claimed by the receivers that while extensive renewals and repairs had been made by them on the line of said road they were not greater in amount than would continue to be necessary for many months to come in order to operate the road safely; that, owing to the competition of other roads for the business of St. Joseph, the heavy grades and numerous curves on the road rendering it impossible for single locomotives to move heavy trains, the character of the business of that part of the State *it* being the shipping of stock rather than of grain, there was no probability that the earnings of the road, even if credited with its contributions to the remainder of the system, would during the receivership, if ever, pay its operating expenses and taxes without reference to the rental called for by the lease.

I find from the evidence that the operation of the St. Joseph and St. Louis railroad has been a burden to the rest of the property in charge of the receivers since their appointment without reference to the rental charge, and that in all reasonable probability it will continue to be a burden if operated by them as heretofore for an indefinite period. The road owned no rolling stock at the date of the lease.

It was contended on the part of the receivers that, inasmuch as the railroad of the intervenor had not earned its operating expenses during the time for which payment of rental is claimed, such rental should not be paid by them; that the amount of rental accruing prior to the appointment of the receivers was an unsecured claim against the Wabash, St. Louis & Pacific Railway Company, and that

the amount of rental accruing since their appointment was more than offset by losses in operating the road.

62 It was, on the other hand, contended by the intervenor that the total amount of rent accruing under the terms of the lease September 1st, 1884, was an indivisible amount; that the receivers by their action in operating the road adopted all the covenants of the lease, and that, regardless of the earnings of the road, as compared with the expenses of operating it, the intervenor was entitled to be paid thirty per cent. of the gross earnings, as called for by the lease.

It was further claimed by the intervenor that it was entitled to be paid its rental under a clause in the order appointing the receivers, of date May 29th, 1884, as follows:

"That said receivers also, in like manner (viz., 'out of the income that shall come into their hands from the operation of said railroad or otherwise'), pay all rentals accrued or which may hereafter accrue upon all leased lines of said complainant, and for the use of all terminals or track facilities, and all such rentals or installments as may fall due from said complainant for the use of any portion of road or roads or terminal facilities of any other company or companies, and also for all rentals due or to become due upon rolling stock heretofore sold to complainant and partially paid for."

This clause of the order has been interpreted by the court in its order of date April 16th, 1885, adversely to this claim of the intervenor.

I do not accede to the proposition of the intervenor that by taking possession of its road through its receivers and operating it to the present time this court has adopted the lease in its entirety and must continue to operate the road and pay the rental.

I find from the pleadings and evidence that the taxes for the year 1884 on the road of the intervenor have been paid.

63 I further find from the pleadings and evidence that at the date of the appointment of the receivers herein there was due intervenor from the Wabash, St. Louis & Pacific Railway Company on account of rental for the six months ending March 1st, 1884, the sum of $3,096.52, and that at the date of the appointment of the receivers there had accrued under said lease rental to the amount of $12,883.13.

In my opinion these amounts should be allowed as a general unsecured claims against the Wabash, St. Louis & Pacific Railway Company, the sum of $3,096.52 bearing interest, at six per cent. per annum, from March 1st, 1884, and the sum of $12,883.13 bearing interest, at six per cent. per annum, from September 1st, 1884.

On the 7th day of May, 1885, intervenor filed exceptions to the said report lodged by the master on the 27th day of April; which said exceptions are in words and figures as follows, to wit:

Exceptions of Intervenor to Master's Report.

THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*
vs.
THE WABASH, PACIFIC & ST. LOUIS RAILWAY COMPANY *et al.*
} Consolidated Cause.

In the matter of the intervening petition of the St. Joseph & St. Louis Railroad Company.

To E. T. Allen, Esq., master in chancery, to whom said petition was referred:

Now, this day comes the St. Joseph & St. Louis Railroad Company, intervenor, and files its exceptions to the report of the master herein on its intervening petition and claim for rent as follows, to wit:

64 1. Said intervenor excepts to the overruling of its exceptions to portions of the answer of the receivers herein.

2. The master has failed to make any finding as to the allegations of breaches of covenant on the part of the lessee prior to the appointment of the receivers.

3. The master has failed to find and report whether or not as a matter of fact the Wabash, St. Louis & Pacific Railway Company had, prior to the day the receivers took possession thereof, failed and neglected to keep intervenor's road in repair in accordance with the terms of the lease, a fact which is clearly shown by the evidence.

4. The master has failed to find and report whether or not the outlays made by the receivers were extraordinary and were caused by the failure of the lessee to keep intervenor's road in repair in accordance with the covenants of the lease, as to which there is abundant evidence in the record.

5. The master has failed to find what the evidence shows to be the fact, that a large proportion of the expenses incurred by the receivers were for repairs and betterments, and that the necessity for such repairs and betterments arose from the failure of the original lessee and its successors to put and keep the road of intervenor in the condition in which it was to be put and kept by the covenants of the lease.

6. And for further exception intervenor says that the master has failed to find and report whether or not the earnings of intervenor's road have been decreased and diminished by reason of the failure of the lessee to keep and carry out the covenants of the lease, as to which intervenor introduced evidence.

7. Intervenor further excepts because the master has failed to find what the evidence shows to be the fact, that if the road of
65 intervenor had been put and kept in proper condition the traffic over it would have been and would be greatly increased.

8. The master has failed to find and report specifically what have been the expenses of operating the intervenor's road during the time for which rent is claimed in the intervening petition.

9. The master has failed to find and report what will be the probable necessary expense in operating intervenor's road in the future in the condition in which it now is, as to which evidence was introduced by both parties.

10. The master has failed to find and report specifically what benefit the entire system in the hands of the receivers has received from the traffic over intervenor's road. There is nothing in the report to show what, in the opinion of the master, the main line has received from goods delivered to it by the intervenor's road or for goods hauled over the main line destined for points on the intervenor's road. On all these points evidence was introduced by both parties.

11. The master has failed to find and report whether or not intervenor's road is necessary and valuable to the Wabash system as a feeder, as to which evidence was introduced by intervenor.

12. The master has failed to find what the evidence shows to be the fact, that the road of intervenor might be as cheaply managed and operated as most of the other railroads running out of St. Joseph.

13. Intervenor further excepts to the report of the master because he has failed to find—what the evidence shows to be the fact—that both the receivers as well as their manager, Mr. How, were well acquainted with the condition of intervenor's road at the time of the appointment of the receivers and had been familiar with its condition for a long time anterior to such appointment.

66 14. Intervenor further excepts to the finding and conclusion of the master that the order of the court of May 29th, 1884, does not apply to this intervenor nor to its claim for rent; and intervenor says that under said order it is entitled to receive the rent claimed in its petition.

15. And intervenor further excepts to the finding and conclusion of the master that the receivers by entering under the lease have not adopted it and are not bound by its terms and covenants; and intervenor insists that under the evidence before the master and the law governing the case the receivers elected to adopt the lease and are bound by the covenants thereof, and the master should so find.

16. Intervenor further excepts to the recommendation of the master that the amount of rental accrued prior to the appointment of the receivers constitutes only an unsecured claim. Under the law and the evidence produced before the master the same should have been held to be a lien upon the moneys in the hands of the receivers and placed upon the same footing as the other operating expenses of the road.

17. The master has failed to make any specific finding with reference to the rental accrued after the road of intervenor came into the possession of the receivers, and to this omission intervenor excepts. The amount of the rental accrued while the road of intervenor was in possession of the receivers and prior to the order of April 16th, 1885, should be declared to be a debt due and payable to intervenor out of any moneys in the hands of the receivers as a

part of the operating expenses of the system and prior to the claims of any mortgagees or bondholders.

18. The master has failed to find and report whether or not the St. Louis, Kansas City & Northern Railway Company has always earned more than enough to pay its fixed charges and in-
67 terest on all the bonds issued by it prior to the consolidation with the Wabash Railway Company, which fact the evidence clearly shows.

19. The master has failed to find and report whether or not the Wabash, St. Louis & Pacific Railway Company has always earned more than enough to pay its fixed charges and the interest on the bonds which had been issued prior to the lease of intervenor's road to the St. Louis, Kansas City & Northern Railway Company, which fact the evidence clearly shows.

20. Intervenor also excepts to the following finding, to wit, "I find from the evidence that the operation of the St. Joseph and St. Louis railroad has been a burden to the rest of the property in charge of the receivers since their appointment without reference to the rental charged," because the said finding is not supported by the evidence, but is contrary to the evidence; and, further, because such fact, if it be a fact, is no defense to a claim by intervenor for its rental under the lease during the time the receivers have been in possession of its said road.

21. Also to the following finding, to wit, "That in all reasonable probability it (the St. Joseph and St. Louis railroad) will continue to be a burden if operated by the receivers as heretofore for an indefinite period," for the reason that said finding is not supported by the evidence, but is contrary to the evidence and constitutes no defense to a claim by intervenor for its rental under said lease.

22. Intervenor also excepts to the admission in evidence by the master of the paper purporting to show the expenses incurred by the receivers on intervenor's road and the cost of the rails, bridges, &c., laid and built thereon by the receivers, for the reason
68 that it is at best but secondary evidence; that no witness was put upon the stand who made up the paper or who could swear from his personal knowledge that the statements made therein were correct; that no witness did testify that they were correct, and because no opportunity was given to cross-examine the persons by whom said paper was made up or any witness as to the correctness of the statements therein contained.

23. The record does not show our exceptions to the admission of said paper in evidence which we made at the time, and we respectfully ask that the record be amended so as to show that such exception was made at the time.

24. And the intervenor further excepts to the price charged by the receivers for the partly worn steel rails laid upon the road of intervenor and to the allowance of such charge by the master.

25. And for a further exception the intervenor says that the master has erred in sustaining the objections made by the receivers to the following interrogatories in the deposition of William F. Nisbet, said interrogatories having been propounded by the intervenor herein

and being numbered interrogatories 33, 40, 41, 42, 43, 44, 46, 47, 48, 49, 50, 51, 52, and 57, for the reason that the interrogatories above mentioned and to which objections were sustained by the master called for statements made by one Galvin, who was at that time the agent of the receivers and was engaged in the business of his department and were made while in the actual employ of the receivers and were in reference to matters pertaining to the department in which he was so employed; also interrogatories numbered 64, 65, 73, 74, 76, and 77, for the reasons above stated, said interrogatories calling for statements made by one Russell, who was at the time in the actual employ of the receivers, the statements made by him being made while actually engaged in the duties of his business and pertaining to the department in which he was employed.

69 And intervenor respectfully asks that said exceptions be allowed and the report of the master modified in conformity therewith.

PATTISON & CRANE,
Solicitors for Intervenor.

Thereupon the master modified his report by adding thereto the following and making the same a part of his report:

Modification of Report.

The foregoing report having been prepared and (on the 27th day of April, 1885) lodged with the clerk for examination by the parties interested, exceptions thereto were filed by the intervenor on May 7th, 1885.

After considering said exceptions I beg leave to modify my said report by adding thereto the following findings of fact:

I find from the evidence (exception No. 3) that the Wabash, St. Louis & Pacific Railway Company had, prior to the day the receivers took possession thereof, failed and neglected to keep intervenor's road in repair in accordance with the terms of the lease; that (exception No. 4) the outlays made by the receivers were extraordinary and were caused in part by the failure of the railway company, lessee, to keep intervenor's road in repair in accordance with the covenants of the lease, but I further find from the evidence in this connection that extraordinary outlays upon said road for many months, perhaps years, to come will still be required from the same cause; that a part of the expenses (exception No. 5) incurred by the receivers were for repairs and betterments, and that the necessity for such repairs and betterments arose from the failure of the original lessee and its successor to put and keep the road of intervenor in the condition in which it was to be kept by the covenants of the lease, and that there still exists from the same

70 cause a necessity for still further repairs and betterments.

I find from the evidence (exception No. 7) that the gross earnings of intervenor's road have been decreased and diminished by reason of the failure of the lessee to keep and carry out the covenants of the lease, but the evidence does not satisfy me that a

compliance with the terms of the lease by the lessee and its successor or the receivers would at any time since the date of the lease have resulted in any profit from the operation of the road.

There was no evidence before me regarding the expenses of operating the intervenor's road prior to May 29th, 1884. The evidence shows that from that date to January 31st, 1885, the operating expenses of the road, without reference to rental charges, were $177,612.01, and the gross earnings for the same period $116,851.10. From the evidence before me I am unable to say that the probable necessary expenses for operating the road and affording the same facilities for business will in the future be any less than they were during the period named for the same months in the year.

I find from the evidence before me (exceptions 10 and 11) that the intervenor's road has been of no benefit to the entire system in the hands of the receivers, and that the profits on the carriage of goods delivered to the main line by the intervenor's road or hauled over the main line destined for points on the intervenor's road have not equalled the losses incurred by the receivers in operating intervenor's road, and that intervenor's road is neither necessary nor valuable to the Wabash system as a feeder.

As to the matters mentioned in intervenor's exceptions numbered
71 18 and 19, the allegations of intervenor's amended petition relating thereto were admitted by the amended answer of the receivers, filed Feb. 21, 1885.

I have noted in the record of proceedings before me the intervenor's exceptions to the admission of the paper referred to in the 23rd exception to my report.

Respectfully submitted, EDMUND T. ALLEN,
Special Master.

On the first day of July, 1885, the following stipulation was filed in the matter of said intervening petition, to wit:

Stipulation as to Filing of Supplemental Intervening Petition.

THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et als.*
} Consolidated Cause.

In the matter of intervening petition of the St. Joseph and St. Louis Railroad Company.

Whereas at the time when the intervening petition of the St. Joseph and St. Louis Railroad Company was filed rent had accrued under the lease therein set out only to the first day of September, 1884; and whereas since the filing of said intervening petition another six months instalment of rent has accrued, to wit, for the six months ending March 1st, 1885; and whereas all the evidence taken at the hearing before the master under the intervening peti-

tion now on file will apply and is pertinent to the application for payment of the last-mentioned six months' rental:

Now, therefore, it is stipulated by and between the parties interested that the said intervenor may file a supplemental peti-
72 tion asking for the payment of the rent for the six months ending March 1st, 1885, and that the evidence already taken shall be considered as applicable to and introduced in support of said second intervening petition, with the privilege to said intervenor of introducing such further testimony, if any, as it may desire, and that the report of the master shall cover both said petitions, and the further proceedings therein shall apply to both petitions as though only one petition had been filed, embracing the entire year's rent.

St. Louis, May 26, 1885.

PATTISON & CRANE,
Sol'rs for St. Joseph & St. Louis R. R. Co.
H. S. PRIEST,
Sol'r for Rec'rs, Solon Humphreys & Thos. E. Tutt.
PHILLIPS & STEWART,
For Central Trust Co. of N. Y.
HENRY T. KENT,
Of Counsel for Wabash, St Louis & Pacific R'y.

And on the same day there was filed by intervenor a supplemental petition in words and figures as follows, to wit:

Supplemental Intervening Petition.

In the United States Circuit Court, Eastern District of Missouri.

THE CENTRAL TRUST COMPANY OF NEW YORK *et als.* *vs.* WABASH, ST. LOUIS & PACIFIC RAILROAD COMPANY *et al.*	Consolidated Cause.

Now, this day, comes the St. Joseph and St. Louis Railroad Company, which has heretofore filed an intervening petition in
73 said cause asking for an order upon the receivers to pay it the rent due under the lease by said St. Joseph and St. Louis Railroad Company to the St. Louis, Kansas City & Northern Railroad Company, which said lease is set out in full in the intervening petition already filed herein, and files this its further and supplemental intervening petition, and states that under the lease hereinbefore and in said intervening petition mentioned there has accrued and become due to your petitioner since the filing of the original intervening petition herein a further installment of rent under said lease, to wit, rent from the 1st day of September, 1884, to the 1st day of March, 1885, this supplemental petition being filed in pursuance of and under the terms of a stipulation between the parties hereto, which is herewith filed, said stipulation being dated the 26th day of May, 1885.

Your petitioner states that the rent due it for the six months above mentioned, to wit, from the 1st day of September, 1884, to the 1st day of March, 1885, is, according to the terms of said lease, thirty per cent. of the gross earnings of the said Wabash, St. Louis & Pacific Railroad Company; that said gross earnings for said six months amounted to $95,244.57, and the thirty per cent. thereof amounts to the sum of $28,573.37.

Wherefore your petitioner prays the court for an order upon the receivers to pay to it not only the sum mentioned in the original intervening petition filed herein, but also the said sum of $28,573.37 as rental due it for the six months aforesaid, commencing with the 1st of September, 1884, and ending with the 1st of March, 1885, together with the penalty of one-tenth of one per cent. a day from and after said March 1st, 1885, as provided in said lease.

And as in duty bound will ever pray, &c.

ST. JOSEPH & ST. LOUIS R. R. CO.,
By PATTISON & CRANE, *Its Solicitors.*

74 The master thereupon added to his report the following, to wit:

Addition to Master's Report.

After the intervenor's exceptions had been filed and my report modified as above stated a stipulation was filed on the 1st day of July, 1885, permitting the intervenor to file a supplemental petition, which supplemental petition was filed on the last-named date, in substance including within its prayer payment of the rent for the six months ending March 1st, 1885.

Evidence was thereafter introduced, from which I find that the gross earnings of intervenor's road for the six months ending March 1st, 1885, was the sum of $95,244.57, 30 per cent. of that amount being the sum of $28,572.37; that the operating expenses of the same road for the same period amounted to $137,310.22, or more than $42,000 in excess of the gross earnings.

I further find that the gross earnings of the rest of the system in charge of the receivers realized from business originating on intervenor's road for the period above named was the sum of $94,646.01. Assuming that the cost to the system of doing this business was at least 60 per cent. of the gross earnings, there would remain as net earnings realized by the system from business originating on that road the sum of $37,858.40, or between $4,000 and $5,000 less than the direct loss incurred by receivers in operating intervenor's road for the six months ending March 1st, 1885.

I see no reason, therefore, for changing the foregoing report, by reason of the supplemental petition and the evidence introduced thereunder and herewith filed, further than to add that there became due intervenor from the Wabash, St. Louis & Pacific Railway Company on account of rental for the six months ending March 1st, 1885, the sum of $28,572.37.

75 In my opinion the last-named amount should be allowed as a general unsecured claim against the Wabash, St. Louis &

Pacific Railway Company, with interest from March 1st, 1885, at six per cent per annum, in addition to the allowances hereinbefore recommended.

EDMUND T. ALLEN,
Special Master.

The said report of the master, with its modifications and additions as hereinbefore set out, was filed on the seventh day of October, 1885, and the master filed therewith the evidence taken before him at the hearing of said matter, both oral and documentary, which said evidence is as follows, to wit:

Record of Proceedings Before Master.

In the Circuit Court of the United States for the Eastern District of Missouri.

WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, Complainant, *vs.* THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Defendants.	In Chancery. No. 2357.
ST. JOSEPH & ST. LOUIS RAILROAD COMPANY, Intervenor.	Master's No., 50.

Record of proceedings before the master.

This petition, which was filed on November 25th, 1884, was first called for hearing on December 15th, 1884, and, no one appearing, the hearing was continued until 11 a. m., December 16th, 1884.

Pursuant to adjournment, as above stated, on December 16th, 1884, the receivers appeared by George S. Grover, Esq., no one appearing for the intervenor, and the hearing was continued until 11 a. m., January 5th, 1885.

76 Pursuant to adjournment, as above stated, on January 5th, 1885, the receivers appeared by H. S. Priest, Esq., no one appearing for the intervenor, and the hearing of the case was adjourned until 11 a. m., January 12th, 1885.

Pursuant to adjournment, as above stated, on January 12th, 1885, the receivers appeared by George S. Grover, Esq., there being no appearances for intervenor, and the hearing was continued until 11 a. m., January 19th, 1885.

Pursuant to adjournment, as above stated, on January 19th, 1885, the receivers appeared by H. S. Priest, Esq., and George S. Grover, Esq., no one appearing for the intervenor, and the hearing was continued until 11 a. m., January 26th, 1885.

Pursuant to adjournment, as above stated, on January 26th, 1885, the receivers appeared by H. S. Priest, Esq., and George S. Grover, Esq., there being no appearances for the intervenor, and the hearing was continued until 11 a. m., February 9th, 1885.

Pursuant to adjournment, as above stated, on February 9th, 1885,

Messrs. Pattison & Crane appeared for intervenor, H. S. Priest, Esq., for the receivers, and John W. Phillips, Esq., for the Central Trust Company of New York, and the hearing was continued until 11 a. m., February 16th, 1885.

Pursuant to adjournment, as above stated, on February 16th, 1885, E. W. Pattison, Esq., appeared for intervenor, and W. H. Blodgett, Esq., for the receivers, and the hearing was continued until 11 a. m., February 19th, 1885.

Pursuant to adjournment, as above stated, on February 19th, 1885, E. W. Pattison, Esq., appeared for intervenor, and H. S. Priest, Esq., for receivers, and Messrs. Phillips & Stewart for the Central Trust Company of New York, and after argument the demurrer of the receivers to the intervening petition, the same being a
77 part of the answer, and the exceptions of the intervenor to the answer were overruled, and the receivers took leave to file a second amended answer, and the hearing was continued until 11 a. m., February 24th, 1885.

Pursuant to adjournment, as above stated, on February 24th, 1885, the receivers appeared by H. S. Priest, Esq., and the Central Trust Company of New York by J. W. Phillips, Esq., and the hearing was continued until 11 a. m., March 10th, 1885.

Pursuant to adjournment, as above stated, on March 10th, 1885, the intervenor appeared by Messrs. Pattison & Crane, and the receivers by Messrs. Priest & Grover, and the hearing was continued until 11 a. m., March 11th, 1885.

Pursuant to adjournment, as above stated, on March 11th, 1885, the intervenor appeared by E. W. Pattison, Esq., the receivers by Messrs. Priest and Grover, and the Central Trust Company of New York by A. C. Stewart, Esq., and the hearing was continued until 11 a. m., March 17th, 1885.

Pursuant to adjournment, as above stated, on March 17th, 1885, the intervenor appeared by Newton Crane, Esq., the receivers by Messrs. Priest & Grover, and at the request of the intervenor the hearing was continued until 11 a. m., March 24th, 1885.

Pursuant to adjournment, as above stated, on March 24th, 1885, the intervenor appeared by its solicitors, Messrs. Pattison & Crane, and the receivers by their solicitors, H. S. Priest, Esq., and George S. Grover, Esq., and the following proceedings were had:

T. J. CHEW, Jr., sworn for intervenor, testifies as follows:

Direct examination by Mr. CRANE:

Q. You reside in St. Joseph?
A. Yes, sir.
Q. How long have you lived in St. Joseph?
A. Twenty-five years.
Q. What is your business?
A. I am a banker and broker.
78 Q. Prior to your engaging in your present occupation what business were you in?
A. For many years I was in the wholesale-grocery trade.

Q. Have you been engaged in the business you have described during the whole time of your residence in St. Joseph?

A. Yes, sir; continuously.

Q. What is the nature of your connection, as far as your knowledge goes and your experience, with the trade of St. Joseph?

A. As a citizen of St. Joseph and a considerable owner of property there I am largely interested in its prosperity and have always taken a very active interest in all its affairs.

Q. Are you acquainted with the St. Joseph & St. Louis railroad?

A. Yes, sir.

Q. What was your first acquaintance with it?

A. I was one of the original stockholders and one of the officers of the company who built the road.

Q. One of its incorporators?

A. Yes, sir.

Q. You are familiar with the line of it?

A. Quite so.

Q. What other railroads run into the city of St. Joseph?

A. It is a habit of all cities to have as many railroads as possible run into their town. We have the Hannibal & St. Joseph, the Kansas City, St. Joseph & Council Bluffs, the St. Joseph & Western, and the Chicago, Rock Island & Pacific.

Q. That is four railroads besides the one referred to previously by you as the St. Joseph & St. Louis?

A. Yes, sir.

Q. That makes five?

A. Yes, sir.

Q. What connection does that railroad afford to the people of St. Joseph?

A. It gives them a connection over the entire Wabash system with the whole country east of us and affords us what the projectors of the original line have believed to be the most important factor of our railroad interests that we have there. We feel——

79 The master objects to this as encumbering the record with matters that do not concern the court or the case.

Q. What is the character of the trade of St. Joseph?

A. We have a very large jobbing trade in St. Joseph that distributes itself over the east, west, north, and south; perhaps we have flattered ourselves with the largest of any city west of St. Louis.

Q. What relation does this railroad bear to the jobbing trade of St. Joseph?

A. We think it is the most important factor; we consider it the key to the situation as regards rates and railroad transportation.

Q. You are familiar with the character of the railroads running out of St. Joseph?

A. Entirely so.

Q. Do you know the reputation of this road?

A. Yes, sir; I am quite familiar with it.

Q. What relation does it bear in St. Joseph?

A. As compared with other roads?

Q. Yes.

A. We consider it the poorest piece of railroad as far as the railroad itself that comes there.

Q. What do you mean?

A. As far as the track and facilities it affords to the people. The road is in wretched condition and has been for years, and particularly the facilities offered for the passenger traffic are poor.

Q. What other road is there running from St. Joseph to St. Louis direct?

A. The Missouri Pacific, and the Kansas City, St. Joseph & Council Bluffs through their connection with the Missouri Pacific at Kansas City, and, I believe, the Hannibal & St. Joseph from the eastern line of the State. I do not remember the name of the station. They carry passengers and freight.

Q. What is the character of the accommodations furnished by this road?

A. As compared with others, exceedingly inferior.

Counsel for receivers objects to this testimony as immaterial
80 and incompetent, and it is received subject to objection. Objection overruled.—E. T. Allen.

Q. The questions I have asked you with regard to the reputation of the road, its character, its condition, and the character of its accommodations I suppose could be answered by you in the same way for the time of your acquaintance with the road prior to the first of June, when the receivers took charge of it. That is true, is it not?

A. Now, I do not know that I quite understand the directness of the question, but will try to answer it as well as I can. The condition of the St. Louis & St. Joseph has been always bad since its first conception after the St. Louis, Kansas City & Northern took charge of it through its various changes of ownership. It has never been kept in such condition as would recommend it to passenger traffic. At many times the freight traffic has been seriously interfered with. At this time I am informed from the best information I can get and my own knowledge that they could do a much larger business in the coal traffic if the track was in condition and the motive power and rolling stock was in condition to do a larger traffic. It was that way before the receivers took it and it is that way now. We feel in St. Joseph that if it was put in the condition it ought to be it would do the larger part of the passenger business.

Q. Has that feeling existed prior to the time the receivers took charge?

The master os his own motion refuses to permit the question to be asked. Intervenor excepts.

Q. Are you familiar with the northwest part of the State of Missouri?

A. Entirely so.

Q. State what is generally the character of the counties through which this railroad runs.

A. We consider them the richest and best counties in Northwest Missouri.

81 Q. What is the product of those counties?

A. Largely the ordinary agricultural products and cattle, but principally agricultural products and a great many cattle; hogs and horses are raised in these counties. The road runs through Clinton, Ray, and Buchanan county and a little corner of Clay.

Q. What is the value of land there for agricultural purposes as compared with other parts of the State?

A. It is as high as any other part of Northwest Missouri.

Q. Recurring to the character of the accommodations afforded by this road as compared with that of other roads leading out of St. Joseph, if this road were maintained in as good condition as other roads what would be the character of the travel or volume of travel from St. Joseph to St. Louis?

Counsel for receivers objects to this as speculative. Objection overruled.

A. I will state that I know as far as anybody can know anything that, this being the shortest line between St. Joseph and St. Louis, if they offered equal accommodations with other lines they would get the largest share of the traffic.

Cross-examination by Mr. PRIEST:

Q. The Missouri Pacific runs trains daily from St. Joseph by way of Kansas City?

A. It runs trains.

Q. The same number of trains that the Wabash runs?

A. Yes, sir.

Q. What time does the Missouri Pacific leave St. Joseph in the evening?

A. At five o'clock.

Q. What time does the Wabash train leave?

A. At six o'clock.

Q. Do you know the time of the arrival of the different trains at St. Louis?

A. I believe it is identical.

Q. In going over the Missouri Pacific you pass through Kansas City?

A. Yes, sir.

82 Q. There is a great deal of travel between St. Joseph and Kansas City?

A. A very little over that line.

Q. But there is a great deal of travel between those points?

A. Yes, sir; but not over that line.

Q. There is a great deal more travel between St. Joseph and Kansas City than between St. Joseph and St. Louis?

—. I think not.

Q. Do you know what the percentage is?

A. I could not answer as to the percentage.

Q. How many passengers a week, in your opinion, go from St. Joseph to Kansas City?

A. Unfortunately I have not brought any statistics of that.

Q. Have you looked over statistics with a view of testifying as to the freight and passenger traffic from St. Joseph to St. Louis?

A. I have not.

Q. Do you know what the percentage of travel is from St. Joseph to Chicago?

A. I do not.

Q. Does it require any extra sleeper to do the business from St. Joseph to St. Louis, over the Missouri Pacific railway?

A. It does not; I say not—I believe not.

Q. It would require it over the Wabash?

A. Not an extra sleeper, because they have not got any.

Q. It would require one?

A. If they had a sleeper it would do a large business.

Q. It would require an extra sleeper?

A. Not an extra sleeper, because they have not any at all.

Q. To do the business from St. Joseph it would require an extra sleeper, would it not?

A. They have not any sleeper.

Q. The Wabash would have to use an additional sleeper?

A. Not an additional sleeper, because they have not got one.

Q. Did they ever have one?

A. Yes, sir.

Q. What percentage of business did it do?

83 A. Very small; I have ridden over the road.

Q. The sleeper was not half full, was it?

A. No, sir; the car tumbled and rocked so much that people were afraid to ride over it.

Q. They did try a sleeper then?

A. Yes, sir.

Q. Do you know whether there is a large business originating in the neighborhood of St. Joseph and in these counties between St. Joseph and Chicago?

A. Yes, sir; quiate a large business.

Q. Does not a great deal of stock shipped from that country go direct to Chicago?

A. No, sir.

Q. What percentage of it?

A. I could not give it to you because I am not familiar with it. I know this, that statistical information could be furnished from other persons from the board of trade about that, and as far as I can learn the Wabash took more than the C., B. & Q.

Q. Even in its bad condition?

A. Yes, sir.

Q. How has it been this year?

A. I do not know.

Q. You have not heard of any being refused?

A. No; I have heard complaints of freights coming west being delayed, especially coal.

Q. Where does the coal trade originate?

A. At Richmond.

Q. Is that the only source of the coal traffic at St. Joseph?

A. No, sir; unfortunately not. We get the best coal we get at St. Joseph for steam purposes from Richmond, eight or ten miles along the road there.

Q. How many mines are there along the road there?

A. I do not know.

Q. Do you know how many are operated there?

A. No, sir.

Q. Do you know the capacity of those mines for car-loads of coal per day?

A. No, sir; I know this, and being a large purchaser of coal I can speak intelligently on that subject, perhaps being the largest
84 individual purchaser outside of the railroad company, that we have difficulty in having the coal promptly delivered. It is mined but not delivered.

Q. You have information from the coal dealers about that?

A. I have it from my personal experience. I think I am the largest single purchaser of coal outside of the railroad company at St. Joseph. We are very much troubled by delays, and we keep a supply for thirty-five or forty days -head of demands. We buy that coal because we consider it better than anybody else's coal; that comes from the Richmond mines. The coal we get comes from mines between Richmond and the junction. We buy it in very large quantities. Among other business that I have I am manager of the water company and other considerable interests that I buy coal for, and I can speak intelligently from that. I know that we are exceedingly delayed and our cars set aside.

Q. How many loads of coal have you bought from the Richmond mines this winter?

A. Have we bought? I should say one hundred, the gentleman I am associated with; perhaps more than that, not less.

Q. One hundred car-loads between what periods?

A. You said this winter, and if you will say what time winter commences——

Q. I suppose what you call, that season would begin in November?

A. We burn coal the whole year round.

Q. From the first of November to the present time how many cars of coal have you purchased from the mines of Richmond along the line of the road?

A. November, December, January, February, four months, seventy-five cars; perhaps more than that.

Q. How much have you bought per month?

A. Divide seventy-five by four you will get the result.

Q. It will average that proportion per month?

A. It may possibly be more than that; it certainly is not less.

Q. That would be about nineteen car-loads?

A. I should call it about twenty; anywhere from eighteen to twenty cars.

85 Q. Do you know whether these mines were operated by steam or horse power?

A. Unfortunately I am able to give you any information on that subject.

Q. They are one-horse concerns?

A. No; they furnish us the best coal that comes there.

Q. It does not affect the quality of the coal, the manner in which it is raised from the ground?

A. No; they want transportation; they have a method of procuring it.

Q. What other coal mines are there along the road?

A. My recollection is that the mines extend in a radius of ten or twelve miles; they commence just east or south of Richmond.

Q. Is it not a fact there are only two coal mines there, one south and one north?

A. You are better informed than I am, but I would have to differ from you.

Q. I will ask you if you know the fact.

A. My impression is there are a dozen or more mines.

By the MASTER:

Q. What is the price of coal in St. Joseph?

A. That is a confidential question. I will tell you what we pay.

Q. I did not ask you what you paid.

A. It is ten and a quarter cents.

Q. Do you buy the coal delivered at St. Joseph or the mines?

A. Yes, sir; it is delivered at St. Joseph.

By Mr. PRIEST:

Q. Now, do you know how much it pays the railroad company to haul the coal per car?

A. I have not any knowledge whatever.

Q. You do not know the tariff rates for coal?

A. No, sir; we pay so much for coal delivered to us on the track in St. Joseph. What the men pay the railroad company for transporting it I have not the faintest idea.

Q. Nor what the railroad company makes for transporting it?

A. I am not familiar with their affairs and cannot say.

86 Q. You say that the facilities for freight and traffic, for the transportation of the passengers and the traffic over the road, are not equal to the supply. Did I understand you that way?

A. That is what I am informed by people who ship. I know it to be the case as far as coal is concerned. I said it was necessary for us to keep a supply of coal a month and a half in advance, to be sure we could have it when we wanted it. They switch coal cars out when they come to a heavy grade until some train comes that it is convenient for it to take it, and sometimes it is a week in getting there from Richmond.

Q. It is a very difficult road to operate?

A. It need not be so.

Question repeated.

A. It is not very straight.

Q. Are not the grades heavy?

A. Not above the ordinary gradient. I think there is no grade over 52 feet.

Q. How many instances in your experience in receiving coal from the Richmond mines has coal been delayed after it was delivered to the railroad company?

A. We have guarded against that by always keeping a supply sixty days in advance.

Q. Can't you give me the number of instances in which it has occurred?

A. I cannot do that except the miner has said, "You must be careful to keep a supply of coal ahead, because I cannot tell when I will deliver it to you." And so we have built coal-sheds for storing it.

Q. You do not know, as a matter of fact, whether the coal has been delayed?

A. As a matter of personal information I cannot say so; the miner advises us to that effect. It makes no difference to them where it is delivered in advance.

Q. As a matter of fact, you do not know whether their complaints are just or unjust?

A. No, sir; I do not.

Q. You do not know whether they are stating the facts
87 about the delivery of the coal?

A. I do not know positively; but I believe they are telling the truth. I know on one or two occasions the railroad company has had to borrow coal from us.

Q. I expect that is on account of the want of supplies from the mines?

A. I know we had the coal.

Q. There are ordinary passenger cars furnished to transport passengers there between St. Joseph——

A. Very ordinary; not such as are furnished by other railroad companies running their lines in there.

Q. Of course they ran no sleeper and no parlor or palace car?

A. They ran one of the old chair cars; one of the old pattern; they are very dingy and dirty; not such cars as they run on their main line.

By Mr. CRANE:

Q. Speaking about the sleeping cars or rather about the inconveniences of them, that they rocked and tumbled so, that was on account of the rails?

A. The road is out of line and very badly laid.

By the MASTER:

Q. How many times have you been over the line in the last four or five years?

A. I suppose twenty-five or thirty.

Q. In the day-time or night?

A. The train leaves there at this time at six o'clock; it used to leave at five some time ago; it used to leave at four and half past four.

Q. How lately have you been over the road in the day-time?

A. I have not been over the road in the day-time except in coming out last night. We went over one-third of the road in the day-time.

Q. You have no experience as a railroad man, have you, at all?

A. I think I have some sort. I was instrumental with others in building the road and knew all about it when it was built.

88 I have been interested in others.

Q. Instrumental in building the road as owning stock or bonds?

A. I was one of the active men who built the road.

Q. What particular part of building the road did you superintend?

A. I didn't superintend anything; but it became my duty as chairman of the executive committee to go over the road constantly during its construction.

Q. When was that?

A. In 1869 or 1870, I think.

Q. That was about fifteen years ago?

A. Yes, sir.

Q. How long did you continue in charge of that road?

A. The road went into bankruptcy in 1871, and that ended my connection with it.

Q. What was the reason of its going into bankruptcy?

A. It was in consequence of the failure of the St. Louis, Kansas City & Northern railroad or their proprietors and owners to fulfil their contract with reference to the amount of money they were to advance.

Q. It went into bankruptcy before the experiment had been tried of whether it would pay to operate it?

A. Yes, sir.

Q. From the failure to raise money to complete it?

A. Yes, sir. If they had given $100,000 it would have completed the road.

Q. Was it a first-class road when it was built?

A. It was as good a road as is usually built in the West at the time it was finished. The bridges were good and the station-houses were fair; as good as they built then, but not as good as they build now. As the roads get richer and the country gets better they require better accommodations.

Q. How would it compare, as it existed at the time when, as you said, it went into bankruptcy, with the roads that are built now?

A. It would not compare favorably; but at that time it compared with other roads running into St. Joseph.

89 Q. When was it ever in better condition than it was then?

A. At that time it was finished. Of course, there were places where there were soft places—disagreeable places that had to

be fixed. With the exception of two or three points it was in as good condition as any road.

Q. Has it been in better condition since?

A. No; it has been allowed to run down constantly; only such repairs were made as were necessary to allow the rough traffic to be carried over it.

Q. Do you know enough about it to say when it was in its worst condition—its worst physical condition as a railroad?

A. Its worst condition was possibly three or four years ago. I think it was in a worse condition then than now.

Q. Why do you think so?

A. It had ran down so they could not run anything over it. Now they can, by careful management, get a train over it.

Q. Can you locate the time?

A. I should say four years ago.

Q. About 1880?

A. About that time, or perhaps 1881.

Q. Do you know whether it was before or after the consolidation of the St. Louis, Kansas City & Northern with the Wabash to form the Wabash, St. Louis & Pacific railway?

A. I do not remember the exact date of the consolidation; it seems to me the consolidation was in 1882.

Q. It was in November, 1879.

A. Then the road lost its character as the St. Louis, Kansas City & Northern in 1879. If that is the case its worst condition was after the consolidation.

Q. What do you mean by the term lost its character? You say the road lost its character.

A. Lost its name. I do not think it ever had much character to lose.

Q. Has your business led you to be familiar with the course of the East and West traffic along the lines of railroad that center at St. Joseph?

90 A. Well, yes, sir; I think so. I was for many years in the wholesale grocery trade there, and ought to know as much about it as any other merchant would know, and I have watched this thing very carefully since.

Q. Have you had any actual business which led you to inquire into the combinations and competitions regarding railroad freight east and west of St. Joseph?

A. If you will let me answer the question I will say that I am chairman of the transportation committee of the board of trade.

Q. Now, if you have any knowledge of any facts regarding the course of traffic, passenger or freight, I wish you would let us have them, going back for four or five years.

A. I do not exactly understand what your question means as to my having knowledge of absolute facts.

Q. What were the competing lines for freight from St. Joseph to the east or west?

A. Your qualification makes it intelligent. We have the Hannibal & St. Joseph, the St. Joseph, Kansas City & Council Bluffs,

which belongs to the Chicago, Burlington & Quincy, the Missouri Pacific system, and the Rock Island system; we have five systems there. We are vain enough in St. Joseph to say that we have nine roads, but there are only five lines. I am informed that the east-bound freight, grain in particular, as I stated a little while ago, over the Wabash road is greater than over the C., B. & Q. Just how it is as compared with the Hannibal & St. Joseph I cannot say. I do know that the report of the board of trade was made up very carefully from the office records of the different compabies and is reliable.

Q. You say that there are five different lines which could carry, in fact do carry, the grain and other farm products from the region about St. Joseph and St. Joseph this way, which bring to St. Joseph products of various kinds?

A. Yes, sir.

Q. And those roads are all of them roads of very considerable east and north and south connections, are they not?

A. Yes, sir.

91 Q. And nearly every one of them can reach almost any other point of shipment?

A. Yes, sir.

Q. Do you know any other city of the business of St. Joseph which is more favorably situated with reference to its river and railroad transportation than St. Joseph?

A. Yes, sir; Kansas City has more roads than we have. They have got river transportation and we have not got any. The transportation by river of the freight traffic is entirely abandoned. I do not think we have had two boats there for a year.

Q. It is no better business location?

A. They have more roads there, the Chicago & Alton.

Q. Have you any information which would lead you to a conclusion as a business man whether or not the freights collected by the five roads during the last four or five years, in regard to business going to or from St. Joseph, have paid expenses of hauling those freights?

A. That is rather a comprehensive question. I am quite satisfied that all the lines which have done business out of and into St. Joseph have made money on the business they have done or they would not offer these facilities to shippers and passengers. This little piece of road is the only one which has not followed others. It has been falling down when the others were building up. It is a habit of railroad companies when they lease lines to charge the particular road with their proportion of the through rate, while the whole system is benefited by the amount of freight hauled. I understood the other day, when talking with a railroad man of experience, but not of this road—he said that every pound of freight they carried over the branch—that for every dollar it cost them they got sixty-six cents, and it was a loss of one-third of what they received, and he went on to say that there were other contributing causes why they could afford to do business on that basis.

92 Q. So far as you know, except from the amount of improvements you have seen put on the road, they are no richer for having handled the business of St. Joseph?

A. They say they are making money and able to pay dividends on stock and pay interest on bonds.

Q. Did they state to you whether they got it from the business of St. Joseph or some other business?

A. St. Joseph is only a point among other stations on the entire line.

Q. Are you sufficiently familiar with the prices which have been charged for freight during the last four or five years over the different competing lines to know whether the Wabash road has charged more or less for transporting freight than other lines?

A. I happen to be familiar with the fact that the Wabash line and other lines are in a pool, and they all charge the same price.

Q. All these five lines?

A. Yes, sir—that is, it is supposed they are charging the same prices. You cannot look behind the curtain. I know they are very strict. I know that there is a gentleman in the room who will tell you they are so particular about it that in the classification of freight on which the freight is charged that they will open boxes to see what freight is in them.

Q. Are you familiar with the seventy-two miles of road of the four other lines as they leave St. Joseph?

A. Yes, sir.

Q. How do these other lines compare as to the character of roadbed, grades, &c.?

A. I think there is quite a difference. The grades on the Hannibal road for the first seventy-two miles are considerable heavier than on the Wabash.

Q. How about the curves of the Hannibal & St. Joseph?

A. That is a straighter road, a good deal, than the Wabash, but not entirely straight for the first seventy-two miles. The Council Bluffs is laid in the valley that follows the river, and there
93 is no grade of any consequence. One of its branches which runs to Preston and connects with the C., B. & Q. has a heavier grade than the Wabash. The Rock Island reaches St. Joseph for thirty miles over the Hannibal & St. Joseph track.

Q. Suppose that all these roads were in equally good condition, which would be the more economical road to operate, in your opinion?

A. The Wabash would cost more to operate than the Kansas City & Council Bluffs, excepting, under certain circumstances, they get a washout every year by the unusual encroachments of the river. The Council Bluffs is the cheapest and most economical one to keep in order. This road might be as economically kept in order as the Hannibal & St. Joseph.

Q. Are you able to state what would be the expense of putting this road into first-class condition?

A. Well, you have asked me a question I cannot answer. It ought not to be very great to put it in reasonably fair condition. I

will tell you, as a matter of fact, that I was exceedingly disappointed in coming down last night to find it in as bad order as it is now.

Q. And still you think it would not cost much to put it in good order?

A. I think if new rails were put in and lined up. The road-bed is not in the condition it should be. The bridges are all right and the station-houses looked fairly well as we passed them. I do not think it would take much expense to put it in a condition for traffic that would go over it.

Q. What do you mean by that?

A. The traffic that would go over it if the Wabash had a respectable lot of cars and gave to the public the facilities other lines give to passengers. I am satisfied, as far as the traffic between St. Joseph and St. Louis is concerned, that it would get two-thirds of the business. It is the shortest line and the time might be made two hours shorter.

94 Q. Suppose they did get two-thirds of the business, state the grounds of your belief that the business would pay them to do it.

A. I do not know about that. If any business pays any company the more they get the better. The measure of profit is in the quantity.

Q. As a business man you have noticed that corporations as well as individuals try to get business that will pay them. Now, can you explain why the Wabash road has not attempted to get that business?

A. That would be only conjecture.

Q. I understand that.

A. If you would like to have my opinion I will say this: It would seem to me that somebody, I can't say who, has had a desire from the very birth of that road to wreck it. It has passed from one year to another and from one set of hands to another, and I think it is in the hands of as bad a set of men as it has had. I might possibly tell you why it is being done now, but it would only be conjecture.

Q. Let us have your conjecture.

A. If you want me to state my opinion I will give it.

Q. I would like to have it.

A. There are two horns to the dilemma. In my opinion, either of the present lessees of the road are anxious to give up their lease and make a better one afterwards or else the owners and proprietors of the general Wabash system are anxious to buy the stock of the St. Joseph & St. Louis Railroad Company as cheap as possible.

Q. Either one or the other of those reasons, you think, has controlled the action of the Wabash road with reference to that property?

A. I believe so most religiously.

Q. Do you know who owns the stock?

A. I do not. I did know at one time. I have an affectionate regard for the old road because I lost money in its construction. I have no pecuniary interest in it whatever at this time.

Q. You think that that possible controlled the action of the
95 Wabash road up to the time it passed into the hands of the receivers?

A. I think so.

Q. Have you any fact in your mind which would lead you to suppose that the receivers have been controlled by any such purpose?

A. Well, no; I cannot say that I have.

Q. Now, unless there was some such stock-jobbing scheme as you have suggested from your observation of the property there and your experience as a business man, what other reason can you think of as a satisfactory explanation of why that road has been allowed, as you say it has been allowed, to run down and become a wreck, as you call it?

A. I do not know; I should think those two reasons are sufficient.

Q. Suppose neither of them exist; suppose you are mistaken?

A. I will state this to you. You asked me, I think, at what time the road was in its worst condition, and I told you four or five years ago. It certainly is in better condition than it was four or five years ago, but not in as good condition as I expected. I cannot give you any more potent reasons than I have given. I do not know the reasons of other people; there certainly should be some. We believe it would do a fine passenger traffic—of course we do not know it—if it offered such facilities as other roads furnish to their patrons.

Q. The opinion has been rather a general one in St. Joseph that it was not the desire on the part of the managers of the Wabash system or of the St. Louis, Kansas City & Northern Railway Company before the Wabash consolidation to make that piece of property of any account?

A. That certainly is the existing opinion there and has been all the time.

Q. Based upon no other fact than the fact it did not keep it up?

A. It was on account of their constant want of attention to the property. We consider that the key to all railroad rates.
96 We built it for that purpose; we did not expect to make money out of it. It reduced the coal freights and other rates to all points east and west.

Q. Do you know whether there was ever any effort made on the part of the shippers or business men of St. Joseph to have a different state of things in regard to that road?

A. There have been a great many efforts made in that direction.

Q. Did you have anything to do with them?

A. I think I have had on various occasions.

Q. Did you receive any explanation of why matters were so?

A. We were told in the near future that something would be done. Mr. Humphreys was president of the Wabash at one time, and he told me in the station at St. Joseph that in three or four months it would be improved.

Q. When was that?

A. That must have been four years ago. He told us they were

going to put it immediately in the best condition and lay it with steel rails and give it the best passenger accommodations the Wabash was able to afford, but we have not been able to see it yet.

Q. Was that the last effort made in that direction?

A. No, others were made afterwards; it was only a promise that they would do better shortly. It happens to come for me to know about these things from making inquiries from being chairman of the committee I spoke of.

By Mr. CRANE:

Q. Chairman of what committee?

A. Chairman of the committee of railroad transportation of the board of trade.

Q. Are you acquainted with Richard D. Turner?

A. Yes, sir; I am quite familiarly acquainted with him.

Q. State where he resides and his business.

A. He is senior partner in the house of Turner, Frazer & Company, one of the largest grocery houses in the Northwest.

97 I have known him for twenty-odd years.

Q. Do you know Calvin F. Burnes?

A. I have known him for fifteen or twenty years and have been intimately associated with him in business.

Q. What relation does he sustain to the city of St. Joseph and its business?

A. He is one of the largest property holders there and president of the national bank there.

Q. Do you know Dudley Smith?

A. Yes, sir; he is the active partner in a hardware manufacturing company, the largest hardware house in the West outside of St. Louis.

Q. Do you know W. A. P. McDonald?

A. Yes, sir; he is the active partner in the house of R. I. McDonald & Company, as large a dry-goods house as you have in St. Louis. They have a larger building than you have in St. Louis.

Q. Henry C. Adams, who is he?

A. He is secretary of the board of trade.

By Mr. PRIEST:

Q. Do you know what the grades on the Hannibal & St. Joseph are for seventy miles out of St. Joseph?

A. My recollection is that some of them are about eighty feet. When you get to Stewartsville you have one that is about ninety feet. I know that I have stood there and watched a locomotive try to pull ten cars over without success.

Q. Have you ever had any connection with building or operating any road outside of the St. Joseph & St. Louis?

A. No, sir; I was connected in the incipiency with the construction of the St. Joseph & Western; I didn't get very far.

Q. That is the line operated by the Missouri Pacific?

A. No; it has been operated by the Union Pacific and is now operated by the owners of the property.

Q. It is your opinion, then, that the St. Joseph & St. Louis
98 railroad could be operated at a profit?

A. I do not think there is any possible question about it.

Q. Can you explain why the owners of it are so averse to operating it as an independent line?

A. I think I answered that question when his honor asked me, and I said that there seemed to be a disposition on the part of the owners of the Wabash system to make a better lease than they now have with the owners of the St. Joseph & St. Louis or to depress the stock so they can buy it at a low price.

Q. My question was why the lessor was so averse to having the lease set aside if it can operate the road at a profit?

A. I cannot give any other answer than I did give. Perhaps I do not understand your question. I think the answer I gave to his honor's question on that subject covers that.

Q. His question was directed to a different matter—as to why the Wabash Railway Company or your opinion why they had not kept it in better repair and given better facilities to the public. Now, I ask you if it is possible for the road to be operated at a profit, what would you fix the profit at?

A. You ask me something that I cannot answer.

Q. Can't you give me a general estimate of what it would be worth?

A. I would not attempt to do it.

Q. Would it be worth $50,000?

A. I would not attempt to do it.

Q. Why do the owners of the road object to taking it and operating it?

A. I do not think they want to relinquish the road.

Q. Why?

A. Because they consider it a valuable link in their chain.

Q. What chain?

A. You mean the owners of the road?

Q. Yes; the owners of the road. I am talking about them all the time—the lessors.

A. I beg your pardon then.

Counsel for the intervenor objects to this examination as
99 incompetent, and the master rules that it is competent as showing the basis of the views of the witness.

The WITNESS: Your question, I believe, was why the owners of the property itself—the seventy-two miles of road—should be anxious to have it remain in the hands of the lessee. It can very readily be explained by this fact—that as a piece and parcel of the Wabash it gets through traffic.

Q. Could it not make its connections with the Wabash at the junction, the Missouri Pacific at Lexington, the Rock Island road at Plattsburg, and the Hannibal & St. Joseph at Lathrop?

A. I think it would get choked every time it came there.

Q. Are there not four competitive roads for the business of the road?

A. I think it would be throttled every time it came to the junction.

Q. Are there not four competing roads—the Hannibal & St. Joseph, the Wabash, the Missouri Pacific, and the Rock Island—and would they not have an opportunity to make running arrangements with those roads for Chicago and St. Louis?

A. I cannot see why it would pay the Hannibal & St. Joseph to take business from this line.

Q. From the intermediate points on your road the Wabash could not get any freight—it could not by any possibility derive any freight—from the coal mines that you refer to?

A. I think as a component part of the Wabash system the property is much more valuable than as an independent road.

TILTON DAVIS, sworn for the intervenor, testifies as follows:

Direct examination by Mr. CRANE:

Q. Where do you reside?

A. In this city. I have a country residence in Lexington; I spend my summers there.

Q. What business connections have you in Lexington?

A. Do you mean in relation to the road?

100 Q. Well, both in relation to the road and independently of it?

A. Well, my relations to the road are that I am the principal owner of the Lexington ferry.

Q. What ferry is that?

A. The Lexington Ferry & Transportation Company.

Q. Between what points does the ferry ply?

A. Between Lexington and North Lexington.

Q. What railway does it connect or did it connect at North Lexington?

A. With the St. Joseph & St. Louis railroad, a part of the Wabash system.

Q. Do you know whether or not the St. Joseph & St. Louis railroad is now operated from North Lexington to the junction of the Wabash?

A. It is not; at least I have not been there for some little time; I have reason to know it has not been. I had a conversation with the receiver yesterday in relation to it.

Q. In what trade is the ferry company engaged?

A. Engaged in the transportation of freights and passengers—a general ferry business.

Q. Is that business dependent solely upon the local point at which the ferry touches on the north bank of the river?

A. To that in a measure.

Q. At the present time and prior to the cessation of the road from Lexington to North Lexington what was the character of the business at that time?

A. The cessation of the operation of the trains took effect some time in December last. I do not know that there was any percept-

ible difference between that time and what it had been for some year or two before that time.

Q. Prior to a year or two ago what was the condition of the business?

A. The business has been gradually on the decline since 1879.

Q. Say in 1879, did the Wabash road and the St. Joseph
101 & St. Louis and your ferry constitute a line of travel between St. Louis and Lexington?

A. Yes, sir.

Q. And a line in competition with that of the Missouri Pacific Railway Company?

A. Yes, sir; in direct competition.

Q. At that time was it possible for freight to be shipped over your ferry from Lexington to St. Louis by the route I have indicated in the inverse order over the ferry, the St. Louis & St. Joseph, over the Wabash?

A. Yes, sir; freights were shipped into and out of Lexington by the Wabash; goods were received and stock shipped. It did a general business on the Lexington side of the river prior to 1879.

Q. Was freight billed through from St. Louis by the Wabash Railway Company to Lexington by the route I have mentioned?

A. It was.

Q. State, if you know, whether at any time subsequent to 1879 a different course was pursued.

A. I am not able to state exactly when the Wabash road ceased to send their freights to Lexington. My impression is it was some time in 1880, and it may have been in 1879; I can't fix the exact date when they ceased to ship over that line.

Q. If you had any direct experience in endeavoring to ship freight from this city to Lexington by the Wabash and the St. Joseph & St. Louis and the freight was refused, please state when it was.

A. I remember some year or so ago I made application to ship freight.

Q. That was before the road went into the hands of the receivers?

A. Yes, sir; I applied to the office—every shipment that way was, of course, a little better for me—and I was informed that I could ship to the junction, but it could not be sent over the river. There seemed to be some kind of a pool that the Missouri Pacific was to get the freight from St. Louis to Lexington.

102 Q. What further were you told as to the way the freight should be shipped from St. Louis to Lexington?

A. That the idea was to ship by the Missouri Pacific.

Counsel for receivers admit that in 1879 the Missouri Pacific had no road into St. Joseph, and the complainant agreed that if they would stay out of St. Joseph that they would allow them the business into Lexington, and that was the condition under which the Wabash stopped that business, and that the Missouri Pacific stayed out of St. Joseph until 1882.

Q. As a matter of fact, you were told to ship over the Missouri Pacific to Lexington?

A. Yes, sir.

Q. And no rate could be gotten over the Wabash?

A. Yes, sir. I know that from my personal experience.

Q. Are you acquainted in and about Richmond?

A. Yes, sir.

Q. What are the coal mines referred to as being located at Richmond?

A. They have extensive coal mines there engaged in bringing up coal. It is mined considerable there and if in great demand for consumption.

Q. Where is that coal shipped to from Richmond?

A. Well, I suppose that St. Joseph is the principal distributing point for it. They may send some to Kansas City, but I presume not. My idea is that that coal goes to St. Joseph almost exclusively.

Q. What is the character of the track of the St. Joseph and St. Louis road between the junction and North Lexington?

A. The track, the last time I saw it, was not in first-class condition. The old rails put down there originally had been replaced with other rails.

Q. That was old rail originally laid in the road?

A. I think old rail, or old rail had supplied them; the cars could get over it nevertheless.

103 Q. Is there anything else you know in respect to the character of the trade from Lexington to the Wabash, St. Louis & Pacific railway proper with reference to the management of this branch in its value?

A. Yes, sir; I think I am conversant with it; if a man has a pecuniary interest in a matter he keeps his eyes open closely. I think I have a correct idea of the freight and passenger traffic which would constitute the principal objects of traffic over the road.

Q. At the time prior to 1879 when the facilities for the movement of freight were dropped off what was the volume of business carried over this branch?

A. Well, I say this as respects freight prior to 1879, that the company kept its agent at North Lexington and kept its stock yards and the usual facilities for the transportation of freight and stock. A good portion of the La Fayette stock came there; they seemed to prefer that line. We had a certain rate over the ferry which they allowed.

Q. Was the *pro rata* for shipments made into and out of Lexington?

A. For several years I was treasurer of the ferry company. I have an idea of what our rates were in 1879. My impression is that the receipts for freight and stock would run from $75 to $400; probably average $200 a month; that is what we got for transportation. We took them by transfer wagons and carried them over and the receipts would run from $75 to $500 a month—that is, prior to 1879.

Q. What was your tariff?

A. We had various rates; sometimes we made commutation rates by the car-load. I think our car-load rate or charge for the transportation of freight by the car-load was $7 a car; for stock we had

five cents a head, and for freight five cents a hundred. The prices were made low in order to command more freight; in order to enable the Wabash to command as much trade from that side of the river as possible.

Q. When did you visit North Lexington?

104 A. I was there some time in January.

Q. The road was not in operation then?

A. No, sir.

Q. Everything was abandoned?

A. Yes, sir.

Q. When were you last there when the road was running?

A. I think the road ceased to run in December. My recollection is that I was there some time in November—I can't fix the time—and passed over that portion of the road.

Q. How about the station-house, was there a station agent there?

A. There has been no agent there for some time.

Q. How long?

A. I do not know. It has been an annoyance to the travelling public; it drove all the travel off—the character of facilities and the character of cars; it seemed to be operated so as not to make earnings.

Q. Was it operated so as to make direct connection with the railroad from St. Louis to Kansas City?

A. They had a time-table, but the parties who ran it did not run it by the time-table. He lived at Camden and there seemed to be an irregularity about the transportation department. For some year or so back it has been operated so as to drive passengers and freight from the road. They used a car used as a sleeping car that was filled with vermin and no one could sit in it. Our people preferred to take a sleeper and come that way.

Q. You do not mean that the sleeping car ran from there to St. Louis?

A. No; it ran from the junction to St. Louis, and they would prefer to get a sleeper there than at Sedalia.

Q. The sleeping car being full of vermin?

A. I mean the car that ran from Lexington to the junction, which was a kind of hog car that ran between those points.

Q. Take the route from Lexington to St. Louis. Suppose one came by way of the Missouri Pacific, by what route would you go from Lexington to Sedalia—I believe that is the nearest con-

105 necting points on the Missouri Pacific?

A. Yes, sir.

Q. What hour in the afternoon or evening would you arrive at Sedalia?

A. My recollection is this, that a person leaving Lexington in the evening for St. Louis by the Missouri Pacific would leave there between seven and eight and get to Sedalia at eleven or twelve o'clock.

Q. A person going that way and desirous of taking a sleeping car as far as possible would be obliged to keep up until between eleven and twelve and take a sleeper at Sedalia?

A. Take the chances of taking a sleeper.

Q. The chances were that the sleeper, if the travel was good, would be filled?

A. I have experienced that myself. I give that as one reason why the people of Lexington preferred to travel by the Wabash line to St. Louis.

Q. Give your experience in leaving Lexington over the Wabash, provided there was a connection made at Lexington Junction.

A. The time was shorter. You left Lexington at a later hour and reached the junction at ordinary retiring time and with the chances of getting accommodated on their trains. Had the facilities been proper and the connections close I think two-thirds of the entire business would have gone over the Wabash eastward or westward.

Q. How far is it from Lexington to Sedalia, where you take a sleeper?

A. Fifty-six miles.

Q. How far is it from Lexington to Lexington Junction, where you take a sleeper on the Wabash?

A. Four miles.

Q. Do you know whether sleeping-car accommodations were reserved on the Wabash sleeper from Kansas City to St. Louis for those getting on the sleeper at Lexington Junction from Lexington?

A. I do not know that there was any such regulation, but it was easily arranged. I never failed myself and never heard of any
106 one failing to get a sleeper on the main line there. They ran fine sleepers.

Cross-examination by Mr. PRIEST:

Q. The opportunities of getting a sleeper on the Missouri Pacific were not diminished by any travel which ordinarily originated between Kansas City and Sedalia?

A. I do not know. The fact would be about this: On the Missouri Pacific by the time the train would reach Sedalia not only the sleeping cars but the ordinary cars would be full. I have heard complainants made that parties had to stand up between Sedalia and St. Louis.

Q. As they filled up passing along the line?

A. Yes, sir; they were filled up and sometimes they would come from Kansas City.

Q. So would the sleepers on the Wabash be full ordinarily at Kansas City, would they not?

A. I assume at the time they got to the junction the greater portion of those occupying sleepers ordinarily got on at Kansas City, the intermediate places not being populous places. My observation was that the facilities for getting comfortable seats were very much greater on the Wabash than on the Missouri Pacific.

Q. Is it not true that the Missouri Pacific has been running a through train from Kansas City, by Lexington, to St. Louis for eighteen months?

A. My recollection is that they commenced last October. It was some time last year; it may have been a little earlier than October. I am talking of the train made up at Atchison that runs a sleeper by way of Lexington. My impression is it was not earlier than June.

Q. They run there now and have been running since last October, at any rate?

A. Yes, sir; it may have been earlier than that they commenced their train. The train made up at Atchison carries a sleeper. Notwithstanding with the facilities as good on the other side, they would prefer the other line.

107 Q. How much of a haul would there be over the line from Lexington to the junction?

A. Only four miles.

Q. You have a ferryage transfer there and a bus line?

A. Yes; it is as easy to get over that as it is to get to the depot of the Missouri Pacific. We can make the time; we have a good boat there, and it takes very little time to do it.

Q. You are the principal owner of the ferry?

A. Yes, sir.

Q. And the discontinuance of the road?

A. It has riled me and I feel out, of course. I make no concealment of it.

Q. You do not know about the profits of operating the St. Joseph Branch?

A. I do not know.

Q. Do you think that if the St. Joseph Branch was operated as an independent line, separate and apart from the Wabash, that it would do as large a business as it would do in connection with the Wabash, having various competing roads for the traffic that originates on the line?

A. My opinion would be this, that it certainly could not do less than it is now as operated by the receivers.

Q It would have an opportunity to getting an outlet to St. Louis over the Missouri Pacific by way of your transfer line?

A. I should like it very much if it could be done.

Q. And over the Chicago & Rock Island at Plattsburg?

A. I would not oppose such a scheme. I do not think it would be beneficial to the owners of the road, though.

By the MASTER:

Q. What portion of the business which your ferry did was business that was going from North Lexington to St. Joseph or any point on this road other than the junction—business coming this way to St. Louis?

A. What portion went to St. Joseph?

Q. What proportion went over the rest of the lines besides the four miles, if you have any knowledge of it?

108 A. I could not give it correctly; it came through in a lump. My idea is that the large bulk of the business went directly eastward or westward. Our merchants would ship to St. Louis or

eastward over the four miles or to Kansas City. Of course there was some traffic that went to St. Joseph. I am not able to state the character of the traffic. There was quite a local traffic that went to St. Joseph. My idea is that the greater portion went eastward and westward over the Wabash. A great many merchants buy goods here and have them sent to Lexington by the Wabash, and the lumber dealers bought lumber that came over the Wabash at the ferry. The lumber interests that went by the ferry have ceased.

By Mr. CRANE:

Q. What other direct way was there, if there was any, of getting from Lexington and the vicinity of Lexington to the east, west, and south to Richmond and other towns and cities of Ray, Clinton, and Buchanan counties?

A. This road afforded the facilities.

Q. The only facilities?

A. Most of our people who wanted to go to St. Joseph would go by other lines on account of the want of facilities on this line. They would go by the Council Bluffs or go by the Missouri Pacific by Kansas City. Instead of going over the seventy-six miles I know of a number of cases where parties went to the junction and to Kansas City and then to St. Joseph, and others would go from Sedalia to Kansas City and from there by the Missouri Pacific because the facilities were good, and it was a source of great inconvenience.

Most of the business went that way for the reason there was but little certainty of getting over the direct line to St. Joseph.

H. C. ADAMS, sworn for the intervenor, testifies as follows:

Direct examination by Mr. CRANE:

Q. What is your residence?

A. St. Joseph, Missouri.

109 Q. What business are you in?

A. I am secretary of the board of trade.

Q. The board of trade of the city of St. Joseph bears the same relation to the industries of that city that the chamber of commerce does to those of St. Louis?

A. I think so; yes, sir.

Q. In other words, it affords rooms where the daily sessions of business men are held, or where they are accustomed to assemble?

A. Yes, sir. It is an organization of business men for the protection of the commercial interests of the city principally.

Q. How long have you been secretary of the board of trade?

A. Since the first of last September.

Q. You have made an annual report to the board of the condition of the trade of St. Joseph, have you not?

A. Yes, sir.

Q. And that report is known as the Sixth Annual Report of the Trade and Commerce of the City of St. Joseph?

A. Yes, sir.

Q. This report was compiled by you?

A. By me and under my supervision; yes, sir.

Q. I observe from this report that certain statements are made as to the business done by five railways leading into and out from St. Joseph for nine months of business, from January to September, inclusive, of the year 1884. Those railroads are the Kansas City, St. Joseph & Council Bluffs Railway Company, the Wabash, St. Louis & Pacific Railway Company, the Chicago, Rock Island & Pacific Railway Company, the Chicago & Alton Railway Company, the Hannibal & St. Joseph Railway Company, and the Missouri Pacific Railway Company; and those statements show that the total amount of shipments from St. Joseph in car-load lots in the year 1884 by the Council Bluffs road was 2,459; by the Wabash, 2,941; by the Chicago, Rock Island & Pacific, 917; by the Chicago & Alton, 876; by the Hannibal & St. Joseph, 1,052, and by the Missouri Pacific, 263. Are those statements showing the amount of shipments from St. Joseph during the period mentioned correct?

110

A. Yes, sir; to the best of my belief they are.

Q. I observe, with reference to the tabulated statements of the shipments over the Wabash, St. Louis & Pacific railway from the St. Joseph station for the year 1884, in car-loads, that there were 39 car-loads of wheat, 2,188 of corn, rye, and oats, 27 of bran, mill, feed, and flour, 37 miscellaneous, 133 of meat, tallow, and lard, 17 of hair and rags, 10 of fertilizers, 6 of scrap-iron, 15 of hides and wool, 220 of cattle, horses, and mules, and 249 of hogs and sheep. Is that a correct statement of the shipments by the Wabash, St. Louis & Pacific railway?

A. Yes, sir.

Q. In using the term "Wabash, St. Louis & Pacific railway" what railway is meant?

A. As I understand it, the St. Joseph & St. Louis Railway Branch and the main line of the Wabash.

Q. Is there any other connection of the Wabash railway into or out of St. Joseph other than the one you have just referred to as the St. Joseph Branch, as it is called?

A. No, sir.

Q. On page 23 of this Sixth Annual Report made by you to the board of trade, for 1884, I see a statement of the sales, wholesale and retail, of the city of St. Joseph, and observe that the total amount of such sales was $93,137,981. Is that a correct exhibit of the sales of the city of St. Joseph?

A. I should say it was approximately correct; it is a statement that can only be obtained approximately.

Q. You made that statement yourself?

A. Yes, sir.

Q. And made it in the line of your duty as secretary of the board of trade?

A. Yes, sir.

Q. And with the facilities that you enjoyed as such secretary?

A. Yes, sir; and I believe it to be very nearly correct.

Cross-examination by Mr. PRIEST:

111 Q. These shipments of car-load lots over the various railroads named in your report has reference exclusively to shipments from St. Joseph?

A. Yes, sir.

Q. From whom did you get the facts which enter into the formation of this report of shipments made as indicated in the report?

A. I will answer that with a little explanation preceding my answer, if you will permit me. I obtained those figures with the understanding that the immediate source of my information was to be regarded as confidential, but I can state it thus far, that they were compiled from the statements of an agent of the Southwestern Pool, and they are correct.

Q. Well, have you any personal knowledge as to their accuracy?

A. I have to that extent if their books are correct.

Q. To the extent that the agent of this pool gave them to you?

A. Yes, sir.

Q. Did you examine the books in person?

A. I did not examine them in person minutely, but I had a competent assistant who did, and I know his figures are correct.

Q. So this is something given to you by the agent of the Southwestern Pool Company?

A. I obtained my statements from the Southwestern Pool; yes, sir.

Q. Has the Chicago & Alton Railroad Company any railroad running into St. Joseph?

A. No, sir; but they get some business from there, as I understand, over some other lines. I don't know just how they do get their goods out of there.

Q. Are these goods going west or going east?

A. Going east.

Q. Exclusively east?

A. I think so; yes, sir.

Q. Have you any table in this report which shows the number of car-loads of goods, merchandise, &c., that came to St. Joseph from the east?

A. No, sir. I came into the board of trade so recently before the time which, under our by-laws, that report had to be made

112 that I could not obtain those figures for that year.

Q. Do you know that the number of cars represented as being shipped from St. Joseph over the Wabash road came over what is known commonly as the St. Joe Branch?

A. As to that I could not say: I presume they did, as that is the only means we have of getting out there.

Q. You have the Chicago & Alton represented there, and you don't know what means it had of getting out of St. Joseph?

A. I admit that, but that was part of the statements from which we obtained these reports.

Q. You don't know how those statements you got from the agent

of the Southwestern Pool Association were compiled and what avenues of shipments were credited?

A. Well, these are his daily, weekly, and monthly statements to the pool association.

Q. You don't know how he compiled them?

A. No, sir; I did not see him compile them.

Q. You don't know what factors he took into consideration in making this compilation?

A. No, sir.

Q. The Wabash, St. Louis & Pacific Railway Company, according to your report, drew out of St. Joseph a larger quantity of goods than any other single road leaving St. Joseph for the east?

A. I believe that is the way it appears; yes, sir.

Q. It seems, then, notwithstanding its very poor accommodations for the transportation of freight, that it did the largest business of any road emanating from St. Joseph?

A. Yes, sir—that is, on the east-bound freight.

Q. It has no line west of there?

A. No; we have lines, however, west of that that are not shown there.

Q. Then its transportation or carriage of goods shows favorably during this period as compared with other periods?

A. Periods previous to this time?

113 Q. Yes.

A. I don't know anything about that. I have never investigated beyond the time covered in the report.

DUDLEY SMITH, sworn for the intervenor, testifies as follows:

Direct examination by Mr. CRANE:

Q. What is your business?

A. Jobbing hardware and the manufacture of lines of goods.

Q. What is the name of the firm?

A. The Wyeth Hardware & Manufacturing Company.

Q. How long have you been connected with that firm?

A. The first of January a year.

Q. How long have you been in that business?

A. From the first of January a year in the hardware business; previous to that I was engaged in jobbing groceries.

Q. How long have you resided in St. Joseph?

A. Something like fifteen years.

Q. Are you familiar with its trade and commerce?

A. Yes, sir.

Q. And its geographical location?

A. Yes, sir.

Q. Do you know the St. Joseph & St. Louis Railway Company?

A. Yes, sir.

Q. You also know the other railroads centering in St. Joseph?

A. Yes, sir.

Q. You have been present to-day and heard spoken of in the examination the four other railroads centering in St. Joseph?

A. Yes, sir.

Q. What is the general reputation and character of the St. Joseph road as compared with that of the other roads centering in St. Joseph?

A. As far as comparisons are concerned it does not compare favorably at all.

Q. On what account, in what way?

A. In the matter of rolling stock, equipment of the road, and the track and road-bed.

114 Q. What is the most direct route, if you know, from St. Joseph to St. Louis?

A. I think by the Wabash via the R. and L. Junction and the St. Louis & St. Joseph road.

Q. Is that the popular impression, so far as you know, in the city of St. Joseph?

A. Yes, sir.

Q. What is the character of accommodation and facilities for travel of the St. Joseph & St. Louis road?

A. From here to the R. and L. Junction it is very good; from the R. and L. Junction to St. Joseph the accommodations, I don't know of any worse anywhere.

Q. What is the character of the accommodations of this road as compared with that of other railways centering in St. Joseph?

A. The rolling stock on the other roads, as far as passenger travel is concerned, they supply passengers with sleeping accommodations termed sleeping cars, and on the Missouri Pacific they have a dining or buffet car. On this road we have three coaches, and they have been there for so many years. I have not travelled over the road for three years, and they look like they have been there ever since.

Q. I am not speaking now of what they are at present as what they were before the receivers took charge. Is there any difference in their character?

A. I don't think there is.

Q. You mean, when you speak as to the character of the road in respect to other roads and its conditions, that it was in the condition spoken of prior to the time the receivers took charge of the road?

A. Yes, sir.

Q. If a traveler were coming from St. Joseph to St. Louis what would be naturally his way of getting to St. Louis?

A. That is, the quickest?

Q. Yes.

A. The St. Louis & St. Joe road and the Wabash.

Q. What would be the natural course he would take, all things being considered, or what course would he have taken, say,

115 in May or up to May, 1884—that is, before the receivers took charge of the road—taking into consideration the accommodations afforded to him by all the different lines?

A. What road he would take out of St. Joseph?

Q. Yes.

A. I think he would take the Missouri Pacific.

Q. Why?

A. For the better accommodations

Q. If the accommodations were the same on both roads what would he be likely to do? What would a man naturally do?

A. If the same time is made—the quickest time would be apt to catch him is he was in a hurry.

Q. The quickest time would be made over the St. Joseph & St. Louis road, if it was the shortest, other things being equal?

A. Yes, sir.

Q. And the shortest road is the St. Joseph & St. Louis railroad?

A. Yes, sir.

Q. The firm with which you are connected is largely engaged in the hardware business?

A. Yes, sir; they are jobbers exclusively.

Q. You send out commercial travellers?

A. Yes, sir; through all the different sections of the country tributary to that point.

Q. What is the character, if you know, of the counties of Ray and Clinton—that is, the character of the people and the country itself, whether prosperous or otherwise and well populated?

A. As far as the country is concerned I think it compares favorably with other portions of the country in that section of Northwest Missouri. The people are not very ambitious; they are a steady-going people. I don't think they make any great exertions to build up their country—that is, they don't seem to.

Cross-examination by Mr. PRIEST:

Q. The Wabash people at one time did run a through
116 sleeping car from St. Joseph to St. Louis, didn't they?

A. Not that I know of—that is, I don't remember the time.

Q. How often have you visited St. Louis from St. Joseph during the past fifteen years?

A. I have been down, you might say, a good many times; I have been down three or four times in the last year.

Q. Prior to that?

A. About two or three times a year.

Q. What route did you take?

A. I came over the Missouri Pacific prior to this trip, as far as I remember now, except I think in 1876 I came in down on the Wabash.

Q. Between St. Joseph and St. Louis on the Wabash road there are no large towns or cities, are there?

A. On this main line of the road there are one or two very good sized places, as St. Charles and others, but no large cities, not what you might call cities.

Q. So that if the Wabash people were to run a sleeper from St. Joseph to St. Louis they would have to depend for the maintenance of that sleeper chiefly upon the traffic that originated at St. Joseph for St. Louis or at St. Louis for St. Joseph?

A. Yes, sir; principally, I think.

Q. And they would be compelled to run a sleeper expressly for that business—that is, for the through business—from St. Louis to St. Joseph or from St. Joseph to St. Louis?

A. That would be catering to that business principally.

Q The Missouri Pacific Railway Company is not compelled to run an independent sleeper for the accommodation of the St. Joseph business?

A. They run one out of St. Joseph.

Q. They can depend on filling that from Kansas City?

A. They have another from Kansas City.

Q. They run them together, and if they don't fill it at St. Joseph they can fill it at Kansas City or Atchison?

A. I usually find in taking a sleeper that the sleeper from
117 Kansas City is for Kansas City passengers and no St. Joe passenger is allowed in the Kansas City car and no Kansas City passenger is allowed in the St. Joe sleeper, and even if they had only one or two in the St. Joe sleeper they wouldn't allow Kansas City passengers in it.

Q. They kept them separate until they reached Kansas City, and there they could fill them up?

A. There they left their sleeper.

Q. I mean in going from St. Joe to St. Louis?

A. Oh, yes.

Q. And so in going to St. Joe they could fill the St. Joe sleeper at Kansas City and carry it through to St. Joe, or the parlor car or dining car, as the case may be? Now, the shortest route in distance between two points is not always the one selected, is it?

A. It is when the accommodations are equal, usually.

Q. Have you ever passed over the Chicago & Alton from Kansas City to St. Louis?

A. No, sir; but I have from Kansas City to Chicago; it not coming into St. Joseph, we could not make connections properly, so it was either the Missouri Pacific or Wabash to St. Louis and the C., B. & Q. or Chicago & Alton by Kansas City to Chicago.

Q. The Chicago & Alton railroad between Kansas City and St. Louis is much longer in distance than either the Missouri Pacific or the Wabash, isn't it?

A. I don't know what the distance is on the Chicago & Alton road.

Q. They run directly east from Kansas City to Louisiana, on the Mississippi river, don't they?

A. I think so; but not having ridden over the Chicago & Alton only on one or two occasions, I don't know much about it.

Q. The Chicago & Alton is a competing line with the Wabash in passenger and freight business?

A. Yes, sir.

Q. It does an equal share of the business?

118 A. I think the pool allows it the same percentage.

Q. Of course I will not press the inquiry on that matter, as you say you don't know about the line.

A. Not the Chicago & Alton.

Q. I simply want to illustrate the fact that the length of road has nothing to do with the selection of travel; the shortness of time influences the travel in taking one line in preference to another?

A. In the matter of freight traffic it is not the matter of distance or shortness of the route that controls the business; Mitchell, at Chicago, controls the freight business, and if we order freight over the Chicago road and he wants to send it over the Wabash he does it.

Q. He is the manager of the pool?

A. Yes, sir.

Q. Do you understand the system of pooling?

A. Yes, sir, somewhat.

Q. To what extent?

A. They take into consideration the mileage of the road—where they come to and where they go to—and about what their earnings have been previously, and on that they base the percentage of the entire business for the year.

Q. Is the business between Chicago and St. Joseph heavier than the business between St. Louis and St. Joseph?

A. The business between Chicago and St. Joseph I would think would be heavier on account of the freight farther east coming that way—it all comes mostly by Chicago—and that would make the business heavier from Chicago than it would ordinarily from St. Louis; but to take business that centers in each city, Chicago alone going to St. Joe and St. Louis alone going to St. Joe, I think St. Louis would be the heaviest.

Q. Your firm are jobbers in hardware?

A. Yes, sir.

Q. From what point do you get your supplies?

A. From all over the United States; principally from the East, though.

119 Q. Do you direct on what line they must ship?

A. Yes, sir.

Q. On what lines do you do the bulk of your shipping?

A. It depends a good deal on the eastern roads; of course our interests are at stake to a certain extent, and we order them by the road that makes us the rate.

Q. What road is ordinarily selected?

A. There are different roads.

Q. Which is your most accustomed route?

A. In recent shipments?

Q. Your shipments during the year you have been connected with the hardware business.

A. From New York by the Hoosac Tunnel line and over the Wabash and the C., B. & Q. from Chicago. Those are the principal shipments.

Q. Which is the heaviest—over the C., B. & Q. or over the Wabash?

A. I think they have been heavier over the Wabash.

Q. During what period?

A. The last four to five months.

Q. In what direction do you ship out your goods from St. Joseph?

A. We ship goods on every line going out—west, north, and south, including roads that do not come into the town—the Atchison, Topeka & Santa Fé, the Union Pacific, the Kansas Pacific, and the Kansas Central.

Q. Is the bulk of your business west of the Missouri river?

A. Yes, sir.

Q. So you ship over those lines that run west of you?

A. Yes, sir.

Q. In the territory east of St. Joseph you have competition with Chicago and St. Louis jobbers?

A. Yes, sir.

Q. Do you find the Chicago people most enterprising?

A. I don't know; in our line I don't think that is the case.

120 R. E. TURNER, sworn for intervenor, testifies as follows:

Direct examination by Mr. CRANE:

Q. You reside in St. Joseph, do you not?

A. Yes, sir.

Q. How long have you resides there?

A. Twenty-one years.

Q. During that time what business have you been principally engaged in?

A. In the wholesale grocery business.

Q. You are a member of the house of Turner, Frazer & Company?

A. I am.

Q. That is one of the largest wholesale grocery houses in the Western States?

A. It is not the largest; it ranks well up to the largest, I believe.

Q. What relation does that house sustain to other commefial houses in the city of St. Joseph as to the size of its transactions?

A. In groceries, I believe, there is one house in St. Joseph that does more business than we do.

Q. I think I may ask you without any impertinence whether you have not been prominently identified with the business of St. Joseph during your life there.

A. I have been actively engaged in business there for twenty-one years. I would dislike to say whether prominently or not.

Q. You know the St. Joseph & St. Louis Railroad Company?

A. Yes, sir.

Q. What was your first acquaintance with it?

A. I was one of the original incorporators of the company and was identified with them as director. I believe at one time I was vice-president for a short time.

Q. Then you are familiar, more or less, with the line the railroad traverses from St. Joseph to its connection with the Wabash line at what is known as the R. and L. Junction, or the Richmond and Lexington Junction?

A. Not in my connection as one of the company, for I never
121 was over the line until after it was completed. Since that time I have travelled over it frequently.

Q. What is the reputation of this road in St. Joseph as to its character and rolling stock?

A. It does not enjoy a good reputation there for being a safe route and a pleasant route to travel on, and the cars and accommodations have never been good.

Q. What is the character of the accommodations as compared with the other railroads centering in St. Joseph?

A. Not nearly so good. The other roads centering there have sleeping cars, and some of them dining cars or buffet cars, and afford the travelling public better accommodations than the St. Louis & St. Joseph railroad have ever done.

Q. What cars have there been on the train, say, up to within a year or two ago, and I am not including the present time by that, but I want to get at the time prior to which the receivers took charge? What were the passenger trains composed of?

A. About two cars, I think—ordinary old cars—and a baggage car, I think, made up the train generally. Until recently I have not been over the road, I believe, for two years, not until last night.

Q. Why have you not gone over it?

A. Because I preferred going over some other road.

Q. Why did you prefer to go over another road?

A. Because the accommodation- were much better, and I felt it was safer, perhaps.

Q. When you say you have gone over some other route, at those times would it have suited your convenience, other things being equal, to have taken this road?

A. Undoubtedly.

Q. If the accommodation- on this road were as good as some others would you have taken it?

A. I think I would without a doubt, because it is a shorter
122 road to St. Louis; the time of leaving is not favorable to the travelling public. It is not suited to the travelling public, and they have never been well fixed in that respect from St. Joseph; the trains have left at the wrong time of day, and improvement might be made in that respect. I will state I think it has been two years since I have been over the road until last night.

Q. I don't care about the interval in the last two years, for it is only with respect to that period prior to the time the receivers took charge that I want to ask in regard to the condition of the road. What is the character of the country through which this road runs?

A. The road runs from St. Joseph through Buchanan and Clinton counties and touches a corner of Clay county and goes up to the R. and L. Junction. It is a good country and well settled by a thriving, industrious class of people. It is considered a very excellent country, in fact.

Q. What proportion of the area of the counties you have mentioned is cleared and cultivated?

A. That I could not pretend to say. The country is well settled and well developed. There is very little wild land there. I don't know what proportion exactly.

Q. That country is tapped by this line of road, is it not?

A. It runs through that country that I have designated.

Q. When was this road, to your knowledge, at its worst? I mean as far as the maintenance of the road, the track of the rolling stock, was concerned.

A. I could not answer that question intelligently. I have been over the road but once in the day-time, although I have been over it quite often since it was built until the last eighteen months or two years, and I could not pretend to say when it was at its worst, only from general reputation; it always had a reputation of being in bad condition.

Q. Do you know of any causes why this road should be
123 any worse than any other road?

A. In what respect?

Q. Well, some one said this morning that a portion of the Council Bluffs road was subject to overflow and washouts. Now, that road naturally would be a road that would be in a bad condition sometimes. Is there any physical reason why this road should be worse than all the other roads?

A. I think not, sir; the character of the country it runs through is very similar to the Hannibal & St. Joe road.

Q. A rolling country?

A. Yes, sir.

Q. A good, ordinary country?

A. It would certainly not be more difficult to maintain and build a road in this country than in that of the Hannibal & St. Joe and the branch of the C., B. & Q.; that is about the same country, not so good. The other branch of the C., B. & Q., the St. Louis, Kansas City & Council Bluffs, runs on a bottom all the way from Kansas City to Council Bluffs, and they are capable of hauling a much larger quantity of freight. It is at certain times of the year less expensive to maintain, but in case of floods it is very expensive. Not very long ago they had a very serious time; the road was stopped for four or five weeks. It was said—it was simply a rumor, though—that this stoppage involved an expense of about a half a million of dollars. I presume that was an overestimate; still the expense must have been very high.

Q. You don't know of any reason why that should be more expensive to maintain than any other of the roads about there?

A. Taking the occurrence of overflows of the road into consideration, I see no reason why it should.

Q. That is a level piece of country from the junction down to the river?

A. I think the St. Joseph, Kansas City & Council Bluffs road, being a level track and cheap to operate, except in times of overflow, which occurs almost every season—taking that into consider-
124 ation, I think it as cheap to maintain the St. Louis & St. Joe

road as the Council Bluffs road. Of course, I am not a practical railroad man, and could not say definitely.

Cross-examination by Mr. PRIEST:

Q. You have no practical knowledge of the management or operation of a railroad, have you?

A. No, sir; no practical experience I would put it.

Q. Now, the main line of the Hannibal & St. Joseph railroad is built into St. Joseph—that is, the original main line between Hannibal and St. Joseph, and that part of this road from Cameron to St. Joseph, Cameron being the point where the Rock Island connects with it, is also operated by the Chicago & Rock Island road to give them a connection into St. Joseph. Is that true?

A. Yes, sir; that is true.

Q. So that the St. Joseph Railroad Company derive an income from the operation of the trains of the Rock Island Company over that portion of its road into St. Joe?

A. The Hannibal people, you mean?

Q. The Hannibal and St. Joseph people.

A. Yes, sir.

Q. Now, do you know anything about whether the St. Louis & St. Joseph railroad has *ever* been in a condition to pay for the investment?

A. How do you mean, as a separate road, separate property?

Q. Operated in any way.

A. I can only give you my opinion based upon conversations here and there with people connected with the road.

Q. Do you know as a fact that it ever has paid any money, the operation of that part of the road?

A. I say I can only give you my opinion based upon conversations that I have had with persons connected with the road. For instance, a freight agent of the Wabash system, Mr. Bird, who left the road probably three years ago, as near as I can remember, frequently told me in conversation that he regarded that 72
125 miles of road a- valuable as any 72 miles they operated.

Q. When was that?

A. That was prior to the time he left the road. I have to guess at it. I think it is about three years ago that he left the road. Prior to that time on a number of occasions Mr. Bird, in speaking to me, always said he regarded that as profitable as any 72 miles of road in the system.

Q. Aside from that you know nothing about it; the road has always been in a bad condition, you say; never kept well, and has had that reputation?

A. Yes, sir; I think I will answer that question a little more fully by saying that since that road has been operated by the Wabash it has received, I think, its full share of the freight business in and out of St. Joseph.

Q. As much as it would receive under any other circumstances?

A. Well, that I would not like to say, but I will say it has received a fair and liberal share of the business. As a freight road it has not

been a bad road at all. Freight has been delivered on fairly good time, and it has done a large amount of business. The opinion has been expressed to me by railroad men connected with that and other roads that it was an excellent feeder for the main branch; that a large amount of business originated on it by which they got a long haul, but whether, to bring it down to a mileage basis, it has been profitable I could not say.

Q. You just express this as an opinion; you don't pretend to have any knowledge from the operation of the road or ascertainment of the actual amount of business done over the road whether it has been profitable; you simply express your opinion that it was profitable?

A. That it was a profitable piece of road on account of the large amount of business originating on it by which they got the benefit of the long haul from St. Louis; the Rock Island road, I think it is, about thirty miles from St. Joe; they pay a rental for the
126 track service over that distance. They furnish their own rolling stock, perhaps. They think now of making an independent connection into St. Joe, being well pleased with the business they are doing there.

Q. Do you know whether you received the greater bulk of your business from Chicago or St. Louis?

A. At times the greater bulk comes from St. Louis. Taking the eastern shipments into consideration, perhaps the greater bulk comes from Chicago. As to the business that originates in the two places, until the failure of the Belcher sugar refinery, there has been ten times as much from St. Louis as from Chicago.

Q. In the grocery business?

A. Yes, sir; until the suspension of the Belcher sugar refinery; since that time it has been different. As a rule, southern goods—groceries from New Orleans, and Wheeling, and Louis-, Kentucky, and all those points—come by St. Louis. At times a good deal of eastern trade comes by St. Louis, but on account of the rates most of the eastern trade comes by Chicago.

Q. And over roads that lead from Chicago directly through?

A. Certainly; either the Wabash, Rock Island, or C., B. & Q.

Q. All of the business between Chicago and St. Joseph and St. Louis and St. Joseph over the railroads is pooled, isn't it?

A. Yes, sir; and has been for nearly two years now, I think.

Q. So that you have had no competition among the different roads for the freight traffic?

A. No; the prices are all the same. I was going to make a statement in that connection, that the prices we have been paying for freight are higher since April, 1883, than, I think, we have ever paid since I have been in business. Since the pool has been in existence the prices have been very high.

Q. Then the railroads ought to have got more of a profit?

A. Yes, sir; more of a profit.

127 W. A. P. McDONALD, sworn for intervenor, testifies as follows:

Direct examination by Mr. CRANE:

Q. Do you reside in St. Joseph?
A. Yes, sir.
Q. What is the name of your firm?
A. R. L. McDonald & Company.
Q. What line of business is that firm engaged in?
A. The wholesale dry-goods business.
Q. How long has it been engaged in that business?
A. As a firm, they have been in the business about twenty years.
Q. What relation does that firm sustain to other dry-goods establishments in the Western States in importance?
A. I guess it is as important as any on the Missouri river.
Q. It is engaged in the jobbing trade, I believe?
A. Exclusively jobbing, wholesale.
Q. Are you familiar with this road?
A. Well, to a certain extent I suppose I am.
Q. Do you know what reputation it enjoys in St. Joseph?
A. Yes, sir.
Q. What is that reputation?
A. It is the reputation of not being a first-class road.
Q. And as compared with other railways that come into St. Joseph, is it better or worse then they are?
A. It is considered the poorest of all the railroads coming into St. Joseph.
Q. What relation exists between that and the next poorest as to character?
A. I would not be prepared to say which was the next poorest, although this is considerably poorer than any one of the other roads.
Q. The others are about on a par?
A. Yes, sir.
Q. And this is very much worse than the rest?
A. Yes, sir.
Q. What is the character of the accommodations afforded by it to persons coming from St. Joseph to St. Louis?

128 A. The accommodations are very poor indeed. The cars are old and dingy and look as though they had not received much care and attention. The track appears from riding over it to be in very bad condition. A portion of the track leading out from St. Joseph I noticed last evening in coming over it was made of the old-fashioned rails with chairs, which prevented the joints from being held as a fish-bar would hold them, making it rather rough to ride over.

Q. This is the condition the road was in prior to the time the receivers took charge of it?
A. It has had the reputation of being a poor road for a number of years.

Q. Do you know at what time it had its worst reputation?
A. No; I could not say as to that.

Cross-examination by Mr. PRIEST:

Q. The business done by your firm is done in points chiefly west of the Missouri river?
A. A large proportion of our business is done west of the river. We do a great deal of business east of the river.
Q. Their business is done chiefly in receiving goods from eastern points?
A. We receive our goods largely from points east of St. Joseph.
Q. At what points east of the Missouri river does your house do a jobbing trade?
A. We do a business running from 100 to 150 miles east, and perhaps 200 miles northeast, and perhaps 75 miles southeast—that is, north of the Missouri river.
Q. What proportion of business do you do on the line of the St. Louis & St. Joseph railroad?
A. Well, not a very large proportion.
Q. At what towns along the line of the St. Joseph & St. Louis railroad do you do a jobbing business?
A. I think we sell goods at nearly every station of importance on that road.
Q. How large a business do you do?
129 A. I could not say. We employ salesmen. We sell at Agency, Fraser, Gower, Plattsburg, Lawson, and Richmond.
Q. What amount of goods would you sell annually at Richmond?
A. I am not prepared to say what the amount would be.
Q. Taking all of the points you have named into consideration, what amount of annual business would you do at them—can you form an estimate?
A. I could not form an estimate. Some years it may be more than it would be otherwise. The trade is somewhat fitful and changeable. Sometimes we sell a merchant his bills and sometimes he buys in St. Louis; he is liable to change. Sometimes, if represented by better travelling men, we have better sales.
Q. Over what line do you receive your goods chiefly from the east?
A. All things being equal, we receive them over the C., B. & Q. system. I mean the rates being equal.

By the MASTER:

Q. You stated a few moments since that that was not a first-class road at present?
A. Yes, sir.
Q. Was it ever a first-class road?
A. Indeed I could not say as to whether it was.
Q. How long have you known it?
A. I guess I have known of it since it was originally built.

Q. Now, how long have you been as familiar with it as you are to-day?

A. Well, for some years back; I could not say how long.

Q. Have you ever known it in any better condition than it is now?

A. I think, sir, just after it was originally built it was in better condition than it is now.

Q. Have you known it in the last ten years to be in better condition than it is now?

A. No, sir; I think about twelve or thirteen years ago it was in better condition than it is now.

130 Q. Do you know what was the condition of the road at the time it was leased to the St. Louis, Kansas City & Northern?

A. No, sir.

Q. You do not know whether it was in any better condition than that now or not?

A. No, sir.

Q. Do you know how it compared when it was built with the other lines then existing in St. Joseph?

A. I think it was about as well constructed as any of the lines then existing.

Q. What lines were in existence at the time this was built?

A. The Hannibal & St. Joseph railroad and, I think, the Missouri Valley, if my memory serves me, which has since been the Kansas City, St. Joseph & Council Bluffs. Those, I believe, were the only roads then operating when it was built—perhaps the St. Joseph & Council Bluffs road.

Q. Do you know sufficiently well the business of the road from the beginning of its starting in to do business to be able to state whether there has ever been a time when it did any more business, passenger or freight, than it has done in the last two years?

A. No, sir; I would not be able to state.

Q. Then, so far as you know, it has been carrying as many passengers and as much freight the last two years as it ever did?

A. As regards the passengers, my general impression, without knowledge of the facts, would be that it has not carried as many passengers as it formerly did. I know that in selecting a route from St. Joseph to St. Louis I would not come over the Wabash, although predisposed in its favor, on account of the difficulty of making connections at R. and L. Junction and the roughness of the road and liability to accidents.

Q. That has been your impression?

A. Yes, sir; and the impression of our people generally.

Q. But still, with all that, you are not able to say it has not
131 carried as many tons of freight per annum the last two years as it ever did?

A. No; I can only say as regards our business that it has not carried so much for us. As to other business I could not say. Formerly we shipped nearly all our goods over the Wabash.

Q. How does the total amount of freight business, of freight carried to St. Joseph and brought away from St. Joseph, during this

last year, if you know, compare with the total amount of freight brought from and carried to St. Joseph ten years ago?

A. Well, I could not answer that question, not having any statistics, but, so far as my impression would go, there has been more business in the past year than ten years ago.

Q. And how many more roads to carry it?

A. I could not say. The Missouri Pacific—I am not familiar with the dates when the railroads were built. I cannot remember whether we have had any new roads in the past ten years or not.

Q. Then you do not know, from your present recollection, whether the amount of freight business done has increased in the same proportion as the facilities for doing business over the railroads or not in the last ten years? The facilities have increased, and you say the amount of business has increased. Now, are you able to say whether the amount of business has increased in larger proportion than the facilities for doing business have increased?

A. My opinion is, it has.

Q. That is not from statistics but general impression?

A. General impression. I have no statistics on the matter.

CALVIN F. BURNES, sworn for intervenor, testifies as follows:

Direct examination by Mr. CRANE:

Q. Your are a resident of St. Joseph?

A. Yes, sir.

Q. How long have you resided there?

A. About twelve years.

132 Q. You are familiar with that part of the country and with this road?

A. Yes, sir.

Q. You have heard the testimony of the gentlemen who have been present during the day with respect to the reputation of the road in St. Joseph, the manner in which it has been operated, and its physical condition up to the time the receivers took charge of it. Will you state what that reputation is?

A. It is bad; about as the gentlemen have represented it.

Q. You have also heard statements made by them as to the character of the accommodations that have been afforded for passengers between St. Joseph and St. Louis?

A. Yes, sir.

Q. What is the character of those accommodations?

A. When I have seen it it has been either one or two cars, very common, not at all comfortable, and no sleeper. There was, I think, a sleeper at one time for a little while, but I never went over the road on a sleeper. I think there was a sleeper on for awhile.

Q. Do you know the character of the country through which the road runs?

A. It is a magnificent country.

Q. As compared with other parts of the State?

A. It is as fine a farming country as any in the State.

Q. And as to the area of the country that is cultivated?

A. I think Clinton, Ray, and Buchanan—that portion of it—is closely cultivated. It is thickly settled with good farms and a very good class of farmers generally through that country.

Q. Do you know the condition of this road in 1883?

A. Well, sir, I do not know its condition except from reputation, perhaps. I have once or twice passed over it when I have felt there was a sort of necessity, but I never went over it unless I thought there was.

Q. Do you know about its condition since the receivers took charge?

133 A. I believe I have not been over the road until last night at any time, except one time last summer I came down from St. Joseph. I was too late or something; perhaps disappointed in going on the other road. I remember it because we got delayed just below Richmond. Just after we left Richmond we had a sort of break-down and were transferred over the break in the track. I think we walked through the mud and got through without our baggage to R. and L. Junction in time to catch the train, and we got our baggage down the next day. That is the only time I have been over the road excepting last night. I do not remember when was the last time before. I pass very frequently between St. Louis and St. Joseph. I often go by the Council Bluffs to Kansas City and then take the Wabash, but hardly ever take the St. Joseph & St. Louis.

Q. Why not?

A. I have not regarded it as a good road. It is particularly objectionable, even if it were a good road—the hours running from here to St. Joseph. I would not like to get up at the time they have to get up at R. and L. Junction to take the train there. Coming down, it is somewhat objectionable to make the change also. Unless, as I say, I am pressed for time, I prefer to take one of the other roads and go by the way of Kansas City. Even if I am going by the Wabash I prefer to go to Kansas City and take it there to passing over this road.

Q. It would be safer as you know it?

A. I have not examined the road and do not know that I would be competent to state it, for I know nothing about the road.

Q. The opinion of the people of St. Joseph regarding it is what?

A. There is a desire to avoid it. People are not afraid of losing there lives, but they prefer to avoid it. If they want to go by the Wabash they go by the Council Bluffs to Kansas City and take the Wabash there; at least I have generally done that.

By the MASTER:

Q. You say you prefer to go from St. Joseph by some other
134 line to Kansas City, and then take the Wabash?

A. Yes, sir.

Q. Have you a preference for the Wabash to St. Louis from Kansas City over the Missouri Pacific?

A. I think I have, although I do not think it is sufficiently pro-

nounced for it to make much difference with me, but I believe I like the Wabash from Kansas City better than the Missouri Pacific.

Q. Why?

A. I can't give you any special reason except ordinarily the cars seem, I think, a little cleaner and the road-bed runs, I imagine, a little more smoothly, but I am not a judge of it sufficiently to say. We have those fancies. I do not know as there is any substantial reason. The difference is very slight. I would put myself to no trouble to decide between them if I were at Kansas City.

Q. Is it not a fact in part, at all events, that the smoother character of the riding on the Wabash from Kansas City to St. Louis is owing to the fact that the line, on the whole, is a straighter line than you get this side of Jefferson City on the Missouri Pacific?

A. I do not know the causes. I know I get a jolt, but not what causes it; I expect that is it. I notice very often the curves on the Missouri Pacific cause jolts which are disagreeable.

Q. And in rapid running on trains that is not pleasant?

A. Yes, sir; I have been by every route between St. Joseph and St. Louis. That is an objection to the Chicago & Alton. I have found it very uncomfortable. In justice to it I will say I do not think I have been over that road since a year or two after it was built, and then it was a newer road.

Q. How about the St. Joseph & St. Louis? Is not that a very crooked road?

A. I have never looked at it enough to answer more than from reputation, as often as I have been over it.

Q. Did you ever go over it on a fast train?

135 A. No, sir; I do not think I ever did. I do not think they ever had one there.

Q. Do you think it would be practicable, without a large expense, to run a rapid train over that line?

A. I should think it could be made as good a road-bed as the Hannibal & St. Joseph; it is very much the same character of country and crosses gullies, creeks, &c. I think a large part of it ought to be better. I think there is a sort of valley from R. and L. Junction some distance until you get into the prairie that runs along the bed of the creek. I am not familiar enough with it to speak with certainty. I do not see any reason why it would not be as good as the Hannibal & St. Joseph.

Q. There are some difficulties about arranging the time-card on the road?

A. I do not see why there should be. The hour it leaves now is very satisfactory if there were proper accommodations on it.

By Mr. CRANE:

Q. What time does the Missouri Pacific leave?

A. At five.

Q. Unless they put on a through sleeper from St. Joseph to St. Louis that would not obviate the difficulty?

A. No, sir. I used to take the Missouri Pacific when it left something earlier than five o'clock; I think it left as early as three, prob-

ably, and the Wabash left at five. There was a difference of two hours, and still I would prefer to go by the Missouri Pacific.

By the MASTER:

Q. On account of the connection at the junction?

A. Yes, sir; the sleeper has a good deal to do with it. I have preferred to take the Council Bluffs without a sleeper to Kansas City and then take the sleeper than to go over this road.

Q. What would be the difference in regard to your preference in that way provided the road was in every way equipped in first-class manner?

136 A. Of course, if the two roads were equipped the same way, I would go by R. and L. Junction; it is shorter, and I do not want to ride a mile more than I have to on the railroads, the best of them.

Q. Now, as to the condition of the road at present and what would be the expense of putting it in condition to divert travel from other roads—to that you have no opinion to express?

A. No; I can give you no opinion on that subject. I would like to have it done.

Q. Suppose you were in the position in which the receivers are to-day, and suppose it were true, as they have reported it, that in operating the road as best they knew how since last June that they had lost a large amount per month, have you in mind facts from which you could conclude whether it were wise, as a business proposition, to go on and continue that course or not?

A. No; I have not the facts. I can only say this, that if I were the owner I would rather speak that way than if a receiver, because a man can do as he pleases with his own property. If I were the owner of the entire Wabash system I would try once in getting that road in first-class condition and getting a reputation, not only make it good, but have a good reputation. It may be it was a good road during this time; it may have been, but I do not believe it; thousands of others may be that way. I required a little more evidence than I had, and unless I had been over it recently I would avoid it.

Q. Suppose you were the owner of the road and had ample means to put it in good condition, from your knowledge of the business, how long a time would you think it would take before having put it in perfect good order—spent the necessary amount of money to put it in that condition—would it be before you would expect from it the revenue which would recompense you for the outlay?

137 A. I can probably give you some information in regard to that by referring to the conversation I had with Mr. Humphreys when he was president of the Wabash system. I said to him, "I believe it would pay to put it in first-class condition and operate it as a first-class road and run it in close connection with the St. Joseph & Western road, and if that were done it would not only have a local business from St. Joseph, but it would have the business of the St. Joseph & Western, the business being carried over the short line." That was a connection I urged on Mr. Humphreys, and I think he seemed favorably disposed toward it. I think

now it is so. I have supposed, if there were a bridge at Lexington and the road built through to a connection with the Missouri Pacific at Sedalia, that would perhaps make a better line to St. Louis than the Wabash. Either of these would certainly make this piece of road valuable. If it was in good condition and operated in connection with the Wabash or Missouri Pacific, crossing a bridge at Lexington, and all in first-class condition, I think it would be an excellent road and good paying property. You may put the road-bed in good condition, and if you make the passengers get out of the cars at R. and L. Junction and take another one, especially at night—we are not accustomed to it; travel does not go that way; we want to go through in one car; that will not do.

Q. Whether or not there would be an amount of travel which would warrant taking a sleeper every morning and every night from St. Joseph to St. Louis you are not able to state?

A. I should think there would be, certainly, if they had a reasonable share of the business from the St. Joseph & Western—that road is increasing—and especially if that road becomes a part of the Union Pacific road. That is a thing that is among the early possibilities—perhaps you may say probabilities—that there will be a direct travel by the St. Joseph & Western over the Union Pa-
138 cific directly through from San Francisco. If that were done it would make this the most direct way that you could go from here to San Francisco, I presume.

By Mr. CRANE:

Q. Suppose that the train leaving St. Joseph were equipped with the best kind of a sleeping-chair car—reclining-chair car—and with the best kind of an ordinary ladies' car or some other car of that kind and those cars should be run through as a solid train from St. Joseph to St. Louis, would not they obtain a great deal more travel than in the present condition?

A. It might get more, but it is not what the traveling public want. They want a sleeper. A good day coach would be better than it is now.

Q. There is ostensibly a reclining-chair car?

A. Yes, sir; there was last night.

Q. What was the condition of the chair car last night?

A. It was full last night, and I passed through to the other one. I did not get a seat in it. I do not think there was much choice in it.

By Mr. PRIEST:

Q. Do you know ordinarily what it costs a railroad company for the privilege of hauling one of the sleepers?

A. No, sir; I do not.

Q. Say it is about three cents a mile for the mileage of the sleeper. In addition to that they do all the repairing, and so forth, on the sleeper; pay the royalty and repair. Now, in running a sleeper through from St. Joseph to St. Louis by way of this line it is about 300 miles at a cost of three cents a mile, not taking into considera-

tion the wear and tear and repairs. Now, how many p
you suppose that car would average each trip betwee
and St. Louis?

A. If you were to have no Western connection w
as it is now—I presume it would not average, prob
than five or six; probably six would be as much as
count on, but I think if it had a proper connection West
ought to be full.

Q. What is the fare from St. Joseph to K. and L. Junctio

A. Well, really, on the question of rates, when I buy a tic
what they ask me for it.

Q. $2.50 would be about the amount. That would be $12
would pay if the way of passage for that one trip, and yo
have expended $9 in hauling them, exclusive the matter o
on the sleeper, taking care of it, and the additional power
ing it, so you would have a profit of just $3 on that sleeper
ing the fact that you have to haul it back again, so that by
you go through with it your profit would be almost
that.

A. If you do not count that you are to get some profit o
line for carrying him over that branch. You may carry
here, or otherwise to may go over some other road. I
it would be profitable to operate it as an independent

Q. Your idea is it would be made profitable as it
a connection with the Union Pacific through the
Western?

A. Yes, sir; I do not speak as an expert. I am not
these matters.

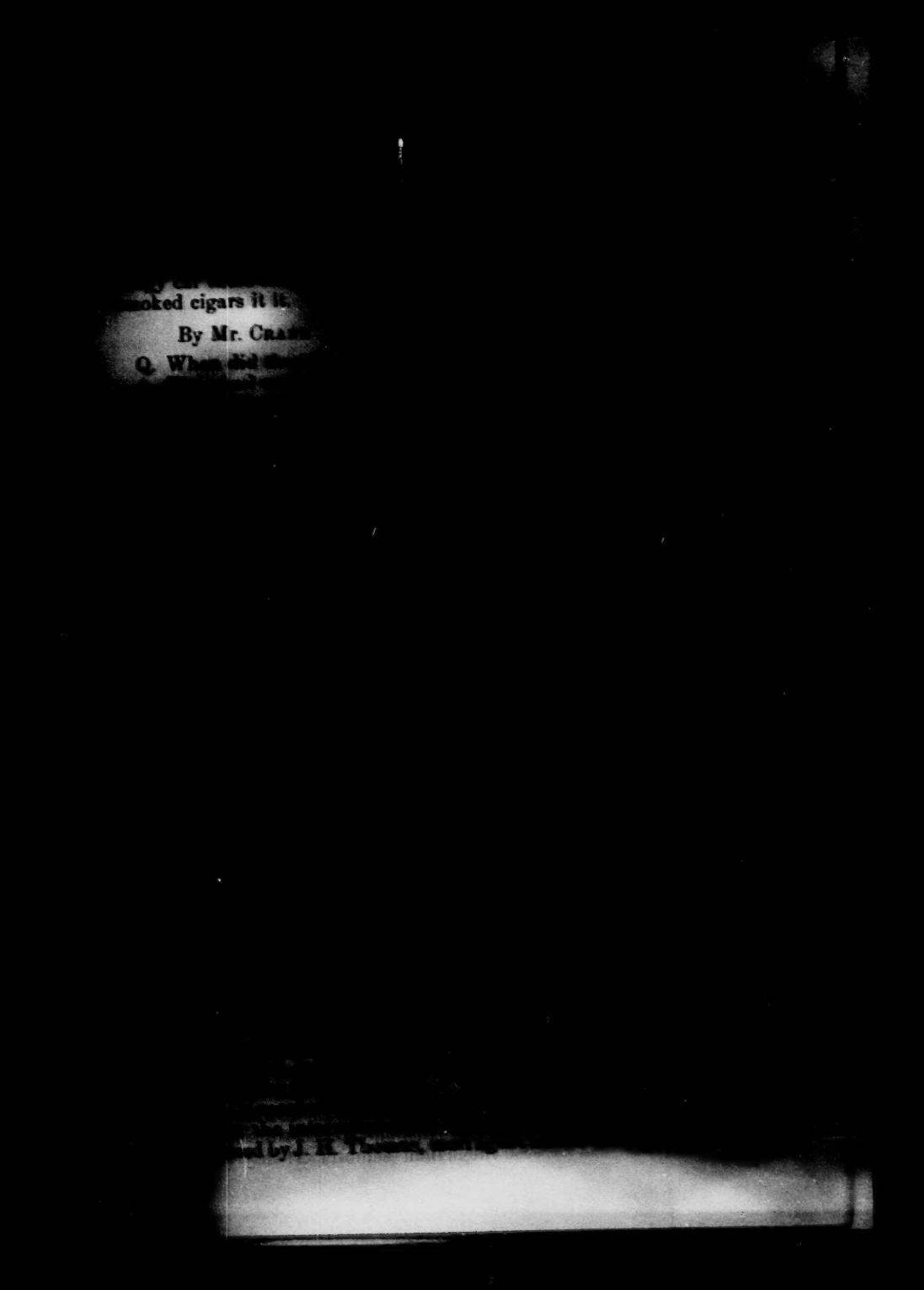
T. Craw, Jr., recalled for intervenor, testifies as follo

Direct examination by Mr. Craven:

Q. State what extra facilities have been offered
St. Joseph over the Wabash system within
ers took charge of the road.

A. Nothing except the inte
not always come. M
active
[illegible]

[illegible] letters from



tion the wear and tear and repairs. Now, how many passengers do you suppose that car would average each trip between St. Joseph and St. Louis?

A. If you were to have no Western connection with it—just
139 as it is now—I presume it would not average, probably, more than five or six; probably six would be as much as you could count on, but I think if it had a proper connection West the sleeper ought to be full.

Q. What is the fair from St. Joseph to R. and L. Junction?

A. Well, really, on the question of rates, when I buy a ticket I pay what they ask me for it.

Q. $2.16 would be about the amount. That would be $12 that you would pay in the way of passage for that one trip, and you would have expended $9 in hauling them, excluding the matter of repairs on the sleeper, taking care of it, and the additional power in hauling it, so you would have a profit of just $3 on that sleeper, excluding the fact that you have to haul it back again, so that by the time you get through with it your profit would be almost infinitesimal?

A. If you do not count that you are to get some profit on the main line for carrying him over that branch. You may carry him to Toledo, or otherwise he may go over some other road. I do not think it would be profitable to operate it as an independent line.

Q. Your idea is it would be made profitable as it now stands with a connection with the Union Pacific through the St. Joseph & Western?

A. Yes, sir; I do not speak as an expert. I am not familiar with these matters.

T. CHEW, Jr., recalled for intervenor, testifies as follows:

Direct examination by Mr. CRANE:

Q. State what extra facilities have been offered to passengers from St. Joseph over the Wabash system within the time since the receivers took charge of the road.

A. Nothing except the introduction of the chair car, which does not always come. Mr. Laughlin, the ticket agent there, is a very active man, the most active ticket agent in St. Joseph. He
140 has been long in business there and is very popular there. He was induced by Mr. Hoxie to take charge of the business, and they promised him an accommodation car, half sleeping car and half reclining car, and he went actively at work, and he told me on one occasion he had sold eighteen tickets in one day, seven to New Orleans, four or five to Baltimore, several to Chicago, Toledo, and other points, and being solicitous, having promised the people he sold tickets that he had a reclining-chair car and having promised berths at the junction, he went down to the Union depot to see the train go off, and found they had nothing there; nothing but an old smoky, dingy car.

Q. How long has Mr. Laughlin been there?

A. Since the first of January. I have seen letters from Mr.

Chandler stating that he has done more business for them during the time he has been there four or five times than has been done in two years.

By the MASTER:

Q. Did you find out why the car did not get there at that time?

A. It did not get there for two or three days, and they did not send an ordinary passenger car to take its place. There was an old dingy car there that Mr. Burnes and I came on last night, and we smoked cigars it it.

By Mr. CRANE:

Q. When did they first open the ticket office uptown?

A. They had one with the Missouri Pacific and the Kansas City and Council Bluffs up to about a year and a half ago, and that was abolished.

Q. From the time that was abolished, a year and a half ago, there was no office of the company in St. Joseph?

A. No city office. On the first of January they started an office, which is a handsome office, and Mr. Laughlin will get the business if he is supported. He says, "What will I do about the business?

I can't induce them to abandon other roads over which they
141 have bought tickets before to go on this when I do not have the cars." I said to write to Mr. Chandler, and he said the facilities had not been furnished. Within a week I saw a letter from Mr. Chandler that Mr. Talmage had promised a combination car would be put on within thirty days. There is no doubt about business being done if the facilities are offered. Mr. Laughlin will sell a ticket to a man whether he wants one or not. We had two coaches last night, and the sleeping car was full at the junction. There was six of our party and others going to New Orleans.

At this point the further hearing of the case was adjourned until 11 a. m., Wednesday, March 25th, 1885.

Pursuant to adjournment, as above stated, on March 25th, 1885, the hearing of the case was resumed.

Present: The master, Newton Crane, Esq., solicitor for intervenor, and H. S. Priest, Esq., solicitor for receivers.

Counsel for the intervenor offers in evidence a statement of the earnings of the St. Joseph & St. Louis Railroad Company from December 1st, 1883, to September 30th, 1884, as earnings only which was obtained from the receivers.

The same is marked Exhibit A and hereto attached.

Counsel for intervenor also introduces a statement furnished him by the auditor of the receivers, D. B. Howard, setting forth the difference between the estimated gross earnings of the road for December, 1883, and January and February, 1884, and also the actual gross earnings for those months.

The same is marked Exhibit B and hereto attached.

Counsel for the intervenor offers in evidence a certified copy of the letter addressed by J. H. Thomas, mail agent between Lexington and

St. Joseph, to the railroad commissioners of the State of Mis-
142 souri, dated December 31st, 1882, as to the condition of the road.

The same is marked Exhibit C and hereto attached.

Counsel for the intervenor also offers in evidence a report made by the board of railway commissioners of Missouri on the inspection of the St. Joseph Division of the Wabash, St. Louis & Pacific railway, made May 4th, 5th, 6th, and 7th, 1883.

The same is marked Exhibit D and hereto attached.

Counsel for the intervenor also offers in evidence a letter addressed by Robert Andrews, general superintendent of the Wabash, St. Louis & Pacific Railway Company, to H. H. Gregg, secretary of the railroad commissioners of the State of Missouri, dated May 21st, 1883.

The same is marked Exhibit E and hereto attached.

Counsel for intervenor also offers in evidence the deposition of William F. Nisbet, which is taken on the 16th day of March, 1885, for use in this case.

Counsel for the receivers objects to the introduction in evidence of the above-named papers, and same are received by the master subject to objection.

Objection overruled.—E. T. Allen, S. M.

At this point the further hearing of the case was adjourned until 11 a. m., April 1st, 1885.

Pursuant to adjournment, as above stated, on April 1st, 1885, the receivers appeared by H. S. Priest, Esq., and the intervenor by E. W. Pattison, Esq., and the hearing was continued until 11 a. m., April 4th, 1885, when the hearing was continued until April 7th, 1885.

Pursuant to adjournment, as above stated, on April 7th, 1885, the hearing of the case was resumed.

Present: Messrs. Pattison & Crane, solicitors for intervenor;
H. S. Priest, solicitor for receivers; A. C. Stewart, Esq.,
143 solicitor for the Central Trust Company of New York, and
H. T. Kent, solicitor for the Wabash, St. Louis & Pacific Railway Company.

Counsel for the intervenor offers in evidence the Compendium of the 10th Census of the United States for the Year 1880, showing the aggregate population of the counties through which the road runs, the assessed valuation of said counties for taxation purposes, the debts of said counties, the farm areas and farm values of said counties, the live stock and its production by said counties, the manufactures by said counties, the character of population of said counties, and the cities and towns of said counties, as follows:

Buchanan county—population, 49,792. Clay county—population, 15,572. Clinton county—population, 16,073. Ray county—population, 20,190. Buchanan county—assessed valuation, $11,458,608. Clay county—assessed valuation, $4,371,764. Clinton county—assessed valuation, $4,854,635. Ray county—assessed valuation,

$4,816,012. Buchanan county—debt, $2,526,835. Clay county—debt, $214,763. Clinton county—debt, $145,000. Ray county—debt, $205,001. Buchanan county—farm area, 170,886 acres. Clay county—farm area, 184,455 acres. Clinton county—farm area, 204,332 acres. Ray county—farm area, 251,766 acres. Buchanan county — farm value, $6,041,017. Clay county — farm value, $4,860,571. Clinton county—farm value, $5,724,125. Ray county—farm value, $4,163,556. Buchanan county—live stock: horses, 6,518; mules and asses, 2,794; working oxen, 28; milch cows, 6,475; other cattle, 10,963; sheep, 5,417; swine, 55,548. Clay county—live stock: horses, 6,832; mules and asses, 2,086; working oxen, 12; milch cows, 592; other cattle, 13,739; sheep, 18,402; swine, 53,516. Clinton county—live stock: horses, 7,281; mules and asses, 1,936; milch cows, 7,335; other cattle, 20,591; sheep, 18,346; swine, 57,437. Ray county—live stock: horses, 8,795;
144 mules and asses, 3,332; working oxen, 50; milch cows, 7,413; other cattle, 16,436; sheep, 11,819; swine, 64,946. Buchanan county manufactures—materials, $6,433,896; products, $8,794,473. Clay county manufactures—materials, $282,171; products, $278,915. Clinton county manufactures — materials, $157,767; products, $287,878. Ray county manufactures—materials, $168,563; products, $250,680. Buchanan county—character of population: native, 42,900; foreign, 6,892. Clay county—character of population: native, 15,127; foreign, 445. Clinton county—character of population: native, 15,373; foreign, 700. Ray county—character of population: native, 19,759; foreign, 431. Buchanan county—cities and towns, 14. Clay county—cities and towns, 11. Clinton county—cities and towns, 16. Ray county—cities and towns, 14.

Counsel for the receivers objects to this as irrelevant and immaterial, and it is received subject to objection. Objection overruled.

Counsel for the intervenor offers in evidence the report of the auditor of the Wabash, St. Louis & Pacific Railway Company to the railroad commissioners, showing the earnings per mile and the expenses per mile of the road in 1883, and the same is marked Exhibit F.

Counsel for the intervenor proposes to offer in evidence a statement of the receipts by the receivers from the St. Joseph and St. Louis road for December, 1884, and January and February, 1885, and the cost of maintaining the road for that time; which statement was never produced, but see testimony of J. F. How, p. 116.

Counsel for the intervenor offers in evidence the contract of the Wabash, St. Louis & Pacific Railway Company with the Union Depot Board at St. Joseph, on page 974 of the exhibits in this case.

145 Counsel for the receivers objects to the same as irrelevant and immaterial, and the master overrules the objection.

Counsel for the receivers offers in evidence the deposition of Nathaniel E. Gouldy.

ROBERT MOORE, sworn for intervenor, testifies as follows:

Direct examination by Mr. CRANE:

Q. You are a resident of this city?
A. Yes, sir.
Q. A civil engineer by profession?
A. Yes, sir.
Q. And president of the Engineers' Club of this city?
A. Yes, sir.
Q. What experience have you had as an engineer in the construction of railroads?
A. Well, I have been engaged in engineering for about twenty years, the major part of that time in the location and construction of railroads.
Q. Are you now connected with any railroad?
A. Not officially.
Q. Do you know the St. Joseph & St. Louis Railroad Company?
A. I know the railroad itself.
Q. When did you last see that road? And state under what circumstances you examined it—with what purpose and in what manner.
A. I visited the road last week for the purpose of ascertaining all the facts I could as to its condition. I went over the road from Lexington Junction to St. Joseph on Wednesday last. I went to Richmond on a passenger train and there, after a few hours' delay, took a freight train which took the whole of the day to get to St. Joseph. The second day after that, the 3rd of April, I came back over the road from St. Joseph to Lexington by a freight train, taking again nearly the whole day, which I spent on the rear
146 platform of the car. I then went down to the river from the junction by team and walked back over the line from there to the river, so that I made as careful an inspection of the whole line as was possible without walking over the whole of it.
Q. Did you make notes of the result of your examination?
A. Yes, sir; I made careful notes at the time.
Q. Now, give us the result of your examination of the road, taking up first the rails. State what they are as to their general character and where and to what extent they are worn and where they need renewal, if at any places. State the character of the rails laid down as to being new or partly worn at the time of laying down.
A. In the main I found the condition of the rails to be fairly good. I noted, however, certain exceptions where the rails were very much worn and where they are of a pattern that I suppose was first laid on the road. It is a pattern entirely out of date now, old iron laid on chairs and very badly worn. These exceptions are from St. Joseph about three miles, as nearly as I could ascertain it. From there the rails are of a mode-n pattern, with a fish-plate joint, and are in fairly good condition until we reach a point a mile or a mile and a half west of Lawson's Station, where I found the rails to be nearly worn out from there to a point about a quarter of a mile east

of Lawson's Station, near a section-house, where we strike rails that are comparatively new. I estimate that section to be approximately two and one-quarter miles and the former one, near St. Joseph, about three miles. Then there is a section of a mile and a half between Swanwick and Richmond where the rails are old and very much worn. Between Richmond and the junction there is another section of approximately a mile and a half of the same sort, making in the distance from the junction to St. Joseph eight and one-quarter miles of rails which are very much worn and should be replaced. From the junction to the river all the rails are
147 old—I take it the original rails—very much worn. They could still be used, but the road has been abandoned, and I do not know whether it cuts any figure. They are not used now, but if they are proposing to operate that part of the road they should put in a great many new ties or entirely renew the rails. With these exceptions the rails need no immediate renewal. Some of them are quite good and quite new.

Q. Could you tell from the examination whether the rails were new when laid down or had been previously used?

A. At some stations where I noticed them carefully they were evidently old odd lots, short lengths, rails ten and twelve feet long, and all sorts of lengths, but seemed to be in good condition, and rails of different patterns, different mill marks on them. There was no considerable stretch that I was able to note of any kind.

Q. What is the usual length of rail?

A. New rails are thirty feet.

Q. All makes are the same length?

A. That is the customary length. Twenty-four feet is considered a short rail and thirty feet is the standard length.

Q. What were the lengths that you say?

A. All lengths, twelve, fifteen, and eighteen feet.

Q. Did you notice the manner in which the rails were laid down as to whether the joints of the rails were laid on the ties?

A. There was no care taken in that and hardly a possibility of doing it with the odd lengths, but then if the road was otherwise in good condition that would not make any material difference.

Q. Does it make any difference in the road in the condition it is now?

A. I do not think it seriously impairs the condition.

Q. Would the expense of laying the rails be greater where the rails had to be cut off into different lengths?

148 A. It would be unquestionably greater.

Q. The expense of laying?

A. Yes, sir.

Q. And the life of rails laid in that manner would be less, would it not, than rails of a uniform length laid in the usual manner?

A. Yes, sir; I suppose from the fact of their being in short lengths they were rails that had seen service elsewhere. They are evidently not new rails, but rails that have a good deal of service in them yet.

Q. You know the length of the road, do you not?

A. I gathered from the time-card it was 72 miles from Lexington

Junction to St. Joseph. The part which is not used is three and a half or four miles from there to the river. I think the distance is a little shorter.

Q. If that road were in ordinary condition—the same condition as the majority of country roads in the West—what would be the yearly normal cost of maintaining it in rails for a series of years?

—. ——.

By Mr. PRIEST:

Q. Have you been engaged, if so, how long, in the maintenance of a road, say, after construction and after it was put in operation?

A. Only maintenance to a limited condition. The road which I built as chief engineer and chief contractor I maintained for about a year and a half afterwards. Aside from that I have been engaged only in construction.

Q. What road was that?

A. The road in St. Clair county, the Belleville & Carondelet road.

Q. In St. Clair county, Illinois?

A. Yes, sir.

Q. You maintained the road for a year after it was completed?

A. Yes, sir; it was in my entire charge for that length of time, and that is the extent of my supervision of roads.

Q. What is the length of that road?

A. It is about seventeen miles.

149 Q. What was the extent of bridge-work on it?

A. There was a great deal of trestle-bridging.

Q. Was it straight or crooked?

A. Quite crooked; in fact, I call it very crooked.

By Mr. CRANE:

Q. You have been a professional engineer for twenty years?

A. Yes, sir.

Q. During that time your study has been chiefly with respect to railroad-?

A. Yes, sir.

Q. All facts in reference to the construction, equipment, and the maintenance of railways have been under your constant observation and study?

A. Yes, sir.

Q. You are consulted frequently by other railway engineers, are you not?

A. Well, I would hardly answer yes without a qualification.

By Mr. STEWART:

Q. Your knowledge of the cost of the maintenance of a road, is it theoretical or practical?

A. It is both.

Q. Practical to the extent you have stated?

A. Yes, sir; that has come under my personal and official supervision. Of course, being occupied about railroads, I have necessarily informed myself as far as one could who did not have the

actual supercision of all matters concerning the cost of maintenance.

Counsel for the receivers objects to the witness testifying as to the ordinary expense of the maintenance of a roadway, and the testimony is received subject to objection. Objection overruled.—E. T. A., S. M.

By Mr. CRANE:

Q. If that road were in ordinary condition, the same condition as the majority of country roads in the West, what would be the yearly normal cost of maintaining it in rails for a series of
150 years?

A. If that road were laid with new steel rails I should estimate that not over one-twentieth would need renewal each year.

Q. What would be the cost of equipping it with steel rails as you speak of?

A. One-twentieth of the rails—I made a little estimate—would be about 334 tons, approximately—about $10,000 for rails.

By the MASTER:

Q. How long would that take to put the road in repair?

A. That would renew the road once in twenty years.

Q. But if that amount of money was now spent it would be twenty years before the road was completely renewed?

A. Yes, sir; that would renew the rails completely. I was speaking of the removal, the average cost of a road with that use.

By Mr. CRANE:

Q. Then as to the ties.

A. The life of such ties as they use there, oak ties, is from seven to eight years, varying with circumstances.

Q. What condition did you find the ties to be in?

A. In the main they are in fairly good condition, better than I supposed I should find them. In many places I found stretches where the ties were altogether new, and there were a large number of new ties piled along the road, I suppose, for use in the road. I should say the renewals of ties now would be just about the average on such roads.

Q. And that if the average renewal, one in seven or eight, was put in from this time forward the cost would be such as is usual for the maintenance of a road?

A. Yes, sir; the ties have to be removed once in seven or eight years.

Q. Passing on to the road-bed, what is the result of your inspection of the road-bed?

151 A. The road was never constructed as a strictly first-class road. The embankments are now, many of them, perhaps I should say the majority of them, too narrow and ought to be widened. The cuts are in good condition except, of course, they have slid in during the winter and ought to be cleaned out, which, however,

they are doing. The road has never been ballasted except at a number of points, miscellaneous points, along the road, some of which I noted, but it is not material where they are putting in stone ballasts. There are a great many places where such ballast is easily obtained and where it would be naturally put in.

Q. What would be the effect from the cost of operation of the road if it were ballasted or had been ballasted some years ago?

A. Of course, it would reduce the cost of maintenance very materially.

Q. Now, coming to the question of bridges and trestle-works, what was the result of your examination of those?

A. The condition of the bridges is very good. A large part of them have been very recently renewed.

Q. How many bridges are there altogether?

A. There are on the road eleven Howe truss bridges, the larger, longer bridges; and of those I counted five that are new.

Q. When were they built?

A. Built within the last year.

By Mr. PRIEST:

Q. Do you judge from appearances?

A. Yes, sir; they show that they are quite new, just completed within a few months. The Platte River bridge bears the mark on it that it was rebuilt in 1883. Two others, I think, are marked in the road book as built in 1883. I noted in my notes that they were not over a year old, and it was confirmed afterwards by an inspection of the bridge book, which gives the date in 1883, five in 1884, three renewed in 1883, and three of uncertain date, but in good order.

Q. With the exception of the last three, they are of com-
152 paratively recent construction?

A. Yes, sir; they are evidently in good order. I would not undertake to say how long they had been put up.

By Mr. CRANE:

Q. What did you find in respect to the trestles?

A. I might almost say that they have been all renewed or are all in process of renewal. The exceptions are few.

Q. What do you mean by all renewed?

A. New piles have been driven evidently within the last year. Of course, they have been newly capped, and the stringers are quite new. The stringers have been substantially renewed there within the last year. I will say that some are in process of renewal. The piles are there ready to be capped and the timber is there ready to be put on, but not actually put on.

Q. New or old timber?

A. New. It would appear that the purpose was to substantially renew all the trestles.

Q. What proportion of the trestles and bridges have been renewed within the past year?

A. I made notes as I went along of the condition of 103 trestles,

of which I noted 78 as new and 25 as partly new, quite recently or mostly new. It is safe to say that three-fourths were substantially new within the year. I should say, perhaps, in that connection that I noticed a number of stone culverts of which the ends were apparent which were evidently new.

Q. A stone culvert, as I understand, is an opening for the water to pass under an embankment, and it is covered except at the end?

A. Yes, sir.

Q. And it was possible for you to make no inspection other than you made at the time?

A. Yes, sir; the note I made at the time was culverts with new ends, and by looking over the book I see they are noted as
153 made in 1884, so the notation of new ends would be new throughout.

By Mr. PRIEST:

Q. Is this the book you have reference to, in which you say the renewals appear and the date?

A. Yes, sir; the notations of the time when they are built as to some of them. I think, if you will consult 1438, 1437, 1435, 2829, I have noted them as new at the ends, which was the only part I could see.

Q. How do you find the date at which they are put in?

A. There is a column, when built, which is filled out in reference to some of them. That, however, was a subsequent fact which came to my notice. That I noticed after I made the notation.

By Mr. CRANE:

Q. As the result of your examination, taking into account the bridges that have been rebuilt and the trestles that have been renewed, what would be the need of the road in case no great accident took place in the next five or six years?

A. I presume that the three bridges that were built prior to 1883 will need to be rebuilt some time in the next five or six years. The trestles I should say were good for six or seven years, with but little further work.

Q. Then there will practically be no work needed on the bridges and trestles in the next five or six years except with reference to the bridges and trestles built prior to 1883?

A. Yes, sir; very slight. No structure can be left entirely alone.

Q. What is the general character of the road at present with respect to bridges, trestles, and culverts?

A. In that respect it is exceptionally good now.

Q. As to water tanks, what did you observe about them?

A. I think all the water tanks have been put up in the last year except one in St. Joseph, which seems to be an old one.

Q. What condition is that in?

154 A. It is good for some years, yet, evidently, is not a new one. I should say in regard to the Lawson tank it is new there, evidently put up recently. I was told after I made the nota-

tion that it was taken from the main line and put there and the old one taken down.

Q. Then all of the water tanks except the one at St. Joseph have been entirely built during the past year?

A. Yes, sir; that is my observation.

Q. What is the present condition of the road with respect to water tanks?

A. That is as good as it could be.

Q. Passing on to the question of alignments and grades, what do you find the condition of the road to be?

A. The road is certainly a very crooked one. The character of the curves I gathered only from an examination of a map which I found in Mr. Lincoln's office.

Q. Who is Mr. Lincoln?

A. The engineer of the Wabash road. I was requested by Mr. How to go to the office and did so. I find by the map that the maximum curves are six degrees, with a radius of 355 feet.

Q. Is that an unusual curve?

A. No, sir; the curvature is more extensive in amount than it is in degree. Of course the curves were put in for reasons thought to be good—to save work. While following streams they must follow the windings of the streams, and after they reached the dividing ridge they evidently followed the windings of the dividing ridge, so that they have made a very crooked road—more crooked than they need to have done if they had spent a little more money.

Q. The shortest curve is a six-degree curve, which give- 355-foot radius?

A. Yes, sir.

Q. And that is not an unusual or exceptional or excessive curve?

A. No, sir; of course in locating the curve you make the curves as easy as possible, but six degrees is not excessive.

155 Q. About the grade of the road.

A. Well, concerning that I can hardly answer from personal knowledge. I was told the road was laid out with a 53-foot grade, but that was hearsay.

Q. If laid out with a 53-foot grade, taking that as the maximum grade of the road, is that much more than the ordinary grade?

A. If laid out with 53-foot grades it is surprisingly low for that country.

Q. What is the usual or general maximum grade of most Western roads?

A. I know of no roads across Western Missouri, with the exception of the Chicago & Alton, which have not got grades as high as 70 or 80 feet as the maximum. In regard to the Chicago & Alton, I am informed quite reliably that it was built with 53-foot grades, but the Hannibal & St. Joseph report 80-foot grades. The Wabash road in Iowa is reported with 70-foot grades, and the country is substantially the same. The Pacific road has grades of 70 feet, and I think the Independence grade is 90 feet, and through that country generally grades of 70 feet are the rule as maximum grades.

Q. You have made a study of the cost of the operation and

maintenance of roads, and you have also seen, I believe, the report presented by the receivers of the Wabash road to the court with respect to the gross earnings and operating expenses of this road, the gross operating expenses for a period of six months being $130,766.60, and you have been over the road and have examined with respect to its operation. State what is your opinion as to the cost of the operation of this road from this statement.

A. I think the operating expenses as given in the report are very much beyond the normal operating expenses, much more than they will be hereafter. They embrace some items of extra expenditure which will not occur again for a number of years.

Q. What should be the expenses of maintenance and operation of the road per mile per annum?

156 A. I should say $1,800 or $2,000 a mile, with the business which the road seems to be doing, would be a full estimate of its operating expenses.

Q. State to the court what difference the amount of business done by a road makes with the operating expenses.

A. Of course the greater the business the greater the operating expenses. If you were running one passenger train it would cost less than if running three or four each way per day, and so with the respective freight trains. I noticed that the operating expenses of the line per annum were greater than are reported for the Illinois Central, which is a trunk line with a very large business, fast passenger trains and frequent freight trains, and on a road of this character the operating expenses of this magnitude are certainly excessive.

Q. If the road were run at $1,800 or $2,00– per mile per annum that would make $144,000 per annum?

A. Yes, sir; that is a question of mathematics.

Q. And as the statement shows $130,000 for six months it is your opinion that that is excessive?

A. Yes, sir; it is clearly abnormal.

Q. Returning to the question of rails, which we were talking about a little while ago, what is the annual expenses for the renewal of rails and what should it be of this road?

A. As I have said, I should estimate the life of a new steel rail on this road, with the business they do now, about twenty years. If you double the traffic the life of the rails would be much less. To a considerable extent it is a matter of tonnage as well as time.

Q. Taking the road in its present condition with the iron now on it?

A. The rails now on it, as I say, will not last that length of time. Some of them ought to be taken out with the least possible delay.

157 Q. The rails that you speak of that ought to be taken out with the least possible delay are on the eight and one-quarter miles. They are in such bad condition that they ought to be removed immediately?

A. Yes, sir.

Q. Suppose these were removed immediately, what would you say would be the annual cost of maintaining the rails?

A. That is a difficult question, because I do not know how much wear the rails have had. They are in fairly good condition, but not new, and a statement in regard to that would be necessarily an estimate. I should think, however, not exceeding ten per cent.. Possibly not over one in fifteen would need renewal if they were all of that character.

Q. Do you know what the cost of new steel rails was in 1884?

A. I had occasion to estimate on the cost of rails in the summer of 1884, and I estimated it at $32.

Q. Delivered where?

A. In St. Louis.

Q. What weight was that?

A. 60 or 70 pounds. The weight cuts no figure in regard to the cost for any ordinary section of rails.

Q. What is the average weight, as you observed it, of the steel rails taken up from other places put on this road?

A. I could not say. I think there was no rail less than four inches high—no rail less than 50 pounds to the yard—but I could not answer positively. The only rail I measured I think was four and one-quarter inches.

Q. What is the value of a second-hand steel rail? I suppose that depends, however, upon the length of time the rail has been used?

A. It is like the value of a second-hand coat.

Q. Suppose a steel rail is half worn—half the life is out of it—what is its value?

A. Well, it is worth very little more than half of its original worth. The cost of a steel rail entirely worn out is very much less than an iron rail.

Q. Why?

158 A. Because it is more difficult to make is *of* than an iron rail. An iron rail is nearly as valuable as a new one. I think there is as much as $8 a ton in favor of the old iron rail over a steel rail. I was told by a man whose business it was to buy old rails that the difference was $6 to $8 a ton in favor of old iron rails over steel.

Q. You say that the value of a half-worn steel rail is about one-half.

A. Perhaps a little more than half. I would not give one-half.

Q. The cost of laying down a half-worn steel rail is greater than the cost of laying down a new steel or iron rail?

A. Yes, sir.

Q. Taking the steel rails you saw there, which you say had evidently been used elsewhere, what was their value in 1884?

A. Well, as I have said, that is a pretty difficult question to answer.

Q. Give your best opinion on the subject.

A. $20, $24, somewhere, I would say, was the full estimate, of course depending on the amount of wear. Some of them I would not consider worth that much. The figures I give would be the maximum. Some would not be worth as much as $20; as a rule they would be worth that.

Q. The fact that the rails are of an unequal length shows that they were damaged in part to such an extent that they had to be amputated at one or the other or perhaps both ends?

A. It is presumptive evidence of being a broken rail.

Q. What is a broken rail worth?

A. It is difficult to say.

Q. With reference to such prices as you have been stating?

A. I should not consider them worth over $16 or $18; it is a bad bargain at that.

Q. New rails usually have with them the appliances for fastening the fish-plates?

A. No; they do not go with the rails. They are, of course,
159 all punched for fish-plates. Rails that have been broken have to have new holes drilled in them, which is an expensive operation and not very satisfactory when it is done. They are in every way inferior to rails that are drilled in the shop.

Q. That not only adds to the cost of laying the rail that has been sawed off, but the efficiency of the rail when laid is destroyed?

A. Yes, sir; it is not as good a rail.

Q. What would be the value of the rails you saw which were treated in that manner?

A. That is largely a matter of personal opinion. I would consider them high valued at $16 and $18 a ton.

Q. There is a difference, is there not, in the capacity or draft power of a locomotive on a well-constructed road-bed well ironed and one which is not so well constructed and which is imperfectly ironed?

A. Yes, sir; in favor of the well-ballasted, well-built road.

Q. From the result of your observations, tell us what is the capacity of a locomotive in drawing freight cars of that road, if you know? Did you observe how many cars were in a train?

A. I saw trains as they were on the road, but they were constituted to a considerable extent of empty cars and would hardly be an index. I was told that thirteen loaded cars was their train-load. Of course, a loaded car is not always equally heavy. It is still a little indefinite.

Q. Suppose it were desirable to put forty cars in a train, what additions would have to be made to the tractive force of the train?

A. It would be mainly the matter of locomotive power.

Q. You mean a heavier locomotive?

A. Yes, sir; such as ought not to be run on an unballasted road.

Q. What is the weight of locomotives, as you observed them, on that road?

A. Approximately, 30 or 32 tons. I think they are 16 by 24 cylinders and 4½ drivers, which are estimated about 30 to 32 tons.

160 Q. A new locomotive will draw more than an old one, I presume?

A. No, sir; not if the old one is in good repair.

Q. It depends upon the repairs or condition of the locomotive—its tractive force?

A. Yes, sir.

Q. Then a heavier locomotive requires a more substantial road-bed?

A. Yes, sir.

Q. In the character of the rails and the bed in which they are laid?

A. I suppose those locomotives are as heavy as they ought to use to run over an unballasted road.

Q. That is true of passenger coaches and particularly sleeping coaches?

A. It does not make so much difference with the passenger traffic as it does with the freight traffic, and particularly with locomotives. The road is of ample solidity for the passenger traffic now.

Q. For the traffic of a Pullman car we will say. What is the average weight of a Pullman car?

A. I really cannot tell you. I should have to consult table books which I have.

Q. Suppose the average weight of a Pullman car was 30 tons, would it be safe to run a Pullman car at a good rate of speed on a road constructed as that is?

A. I should not consider it safe without the old rails were taken out.

Q. The heavier the car the more comfort, generally speaking, to the inmates. Is not that true?

A. That is considered so.

Q. A light car on an imperfect track makes a very uncomfortable condition for a passenger?

A. You notice in a heavier car the jar is less on the springs than on a light one; that is about all there is of it.

Q. What is the condition of the station-houses on the road, did you examine them?

A. I made some notes with regard to them. Some of them are quite old. One I noted as almost new. I think it was the station-house at Converse, apparently new quite recently. I noted
161 in regard to another that I cannot now lay my hands on at Lawson that it was old and needed painting. The one at Converse was built, I think, in 1883. That was the information. It was apparently new. I should have said built later than that. At Vibbard I noticed the depot had never been painted; it was in bad order.

Q. Did you make any inquiry in reference to the character of the rolling stock and motive power of the railroad?

A. Well, none worth mentioning. I examined the locomotive of the train I went on, but in regard to the others I have no information.

Q. Have you made any estimate in regard to the cost of repairs of bridges in the statement made by the receivers of the distribution of expenses on the line to the general cost of the operating expenses?

A. Yes, sir; I did make some figures on it.

Q. What per cent. does that bear to the total cost of operation?

A. The expenses as reported are nearly 20 per cent. of the total operating expenses.

Q. What is the average expense of the maintaining of bridges as compared with the total operating expenses?

A. By the census volume which you have it shows as the average of nearly 90,000 miles of road that the repairs of bridges are 2 and $\frac{55}{100}$ per cent. of the total operating expenses.

Q. Have you made any other comparative statements of a similar character with respect to the cost of bridges and operating expenses that is mentioned in the distribution of expenses?

A. I made some figures from the former report of the Wabash road as contained in the official report of the road commissioner- of Illinois, and they show a somewhat higher cost of maintenance of bridges.

Q. What percentage was there in that report?

A. I noticed that the cost of operating the Wabash road as given in the last report of the railway commissioners of Illinois
162 was $5\frac{3}{10}$ per cent.

Q. For the maintenance of bridges?

A. Yee, sir; which is much more than the average by the census; but is very much less than the report of the St. Joseph road, about as 5 to 20.

Cross-examination by Mr. PRIEST:

Q. What factors enter into the computation of expenses of operating a road?

A. Of course there is the maintenance of the road itself.

Q. What do you mean, now, by the maintenance of the road itself? What is embraced in that?

A. The road-bed, the bridges, and track. Those are the main factors in the maintenance of a road.

Q. Is that all?

A. I say that those are the main factors; then the maintenance of the motive power, the repairs of locomotives and cars, the fuel for the locomotives and cars, fuel for passenger trains, and the train service; also the station service, the watchman; and there are items of general expenses which I could enumerate, but which is hardly necessary.

Q. Now, in what department of this expense of operating the roads have you any experience, or do you know anything practically from your experience?

A. Well, my experience has been the location and construction and maintenance to the extent that I mentioned.

Q. You have had the experience of maintaining a new road for one year after it was completed?

A. Of course the expenses of the first year of maintenance are somewhat excessive. They are more than the ordinary expenses after the road is fairly put in shape.

Q. Does this year in which you maintained the road embrace the construction?

A. No, sir; it was after the construction.

Q. After the road was constructed and put in operation?

A. After it was built.

163 Q. How many miles did you say there are of that road?

A. Seventeen.

Q. What were the operating expenses of the road during the year of its maintenance?

A. I cannot tell you.

Q. Did you estimate it?

A. No, sir. I had charge of the road as the chief contractor of it.

Q. Now, I want you to tell me just the factors that enter into your computation of the gross expenses of operating the St. Joseph Branch during any given year or any given period.

A. I do not know that I gather quite the force of your question.

Question repeated.

A. Of course I would compare the cost of operating the St. Joseph road with the cost of operating other roads with the same amount of business and the same number of trains. This I found by comparing the report of the receivers with the reports of other roads carrying a vastly greater volume of business: that the St. Joseph road's expenses are equal to those of lines doing a greater amount of business—trunk lines, such as the Illinois Central and Chicago & Rock Island. I take it that expenses of that magnitude on the St. Joseph Branch are excessive, even if the items I have mentioned of new structures did not enter into it at all.

Q. Your criticism of the management by the receivers is based on the fact that you took as the standard of comparison the Illinois Central, a trunk line, and say, as compared with the reported expenditures or gross expenditures on the Illinois Central, that the expenditures of the receivers in the operation of the road are excessive?

A. In my judgment it should not cost as much to operate the St. Joseph Branch. It certainly ought not to cost as much to operate the St. Joseph road as to operate the Illinois Central or the Rock Island.

Q. Have you any judgment based upon any experience in

164 regard to the operation of a road?

A. I have never operated a road.

Q. What reports did you take of the Illinois Central?

A. I took the report in the last volume of the Illinois railroad commissioners.

Q. That is a trunk line?

A. Yes, sir.

Q. Do you know the conditions under which it is operated?

A. I am tolerably familiar with the road itself.

Q. Have you ever been engaged on the road in any capacity?

A. I have been over the road frequently. I constructed a road that joined it—the Cairo Short Line.

Q. To what extent have you been over it?

A. I have been over the Chicago & St. Louis Branch of it a good many times, and from Chicago to Cairo.

Q. How does the physical condition of the Illinois Central road compare with that of the St. Joseph & St. Louis?

A. It is much better.

Q. It is an easier road to operate, is it not?

A. So far as its physical condition.

Q. It is an easier road to maintain?

A. It is now.

Q. Do you know how many car-loads can be hauled on the Illinois Central by one engine?

A. I do not. I know what their maximum grades are on the southern division.

Q. How is the alignment of the road?

A. Very good.

Q. Take the entire system. It is nearly straight?

A. The entire system is very good; of course, there are some curves in it quite crooked. As a rule I call it a straight road.

Q. Do you know how that compares with other roads? Take the Hannibal & St. Joseph. Do you know how the gross expenses of the Illinois Central compare with this?

A. I never compared them.

Q. Have you compared them with the Chicago, Burlington & Quincy?

A. I have made no comparison.

165 Q. Or with the Chicago & Alton?

A. The same answer.

Q So the only comparison you made was between the Illinois Central and the St. Joseph & St. Louis?

A. I compared it with the Chicago & Rock Island, about which I know very much less.

Q. You do not know about the location, physically, of the Rock Island road?

A. Next to nothing.

Q. Do you know how much it costs to run a freight train for any given distance?

A. I know what is reported to be the cost in a great many cases, but I do not know of my own knowledge.

Q. Is it a fact that there is any identity in the gross expenditures on any single line of road with another?

A. No, sir; of course no two are exactly alike.

Q. So that each road is dependent for its gross earnings and gross expenditures upon peculiarities and conditions of its location?

A. There are certain average expenditures but the details differ with each road, of course.

Q. With reference to the steel rails, how many did you examine thoroughly and how many did you find to vary from 12 to 15 feet in length?

A. I noted at the station Fraser. One note which I made was at station Fraser—Joliet steel 76 and 77 short lengths.

Q. How many of them?

A. All that were in sight were odd lengths—of course I did not measure them—10, 12, 20 feet; irregular lengths is what I mean.

Q. How many?

A. I could not tell you; all the rails that I could see at the station.

Q. That is very indefinite. How many could you see?

A. I suppose 40 or 50 rails.

Q. Did you walk over them?

A. Yes, sir.

Q. You noticed the joints of 40 or 50 from the station?

A. I should estimate that. There were that many rails,
166 and I noticed also in the track near Richmond, between Richmond and the Lexington Junction, much the same condition of the rails—that they were odd lengths and odd lots.

Q. Is it not a fact that there is no uniformity in the length of steel rails as they are shipped?

A. Steel rails are bought at a standard length of thirty feet, with a certain percentage limited in the purchase to five or such a matter of short lengths, but the standard length is thirty feet.

Q. But the question is this: are the rails furnished at an unvarying length of thirty feet, and are the contracts for the purchase given that way?

A. Usually the percentage of short rails is limited to five per cent. With that exception they are thirty feet.

Q. Could you tell how long the rails had been in use?

A. No, sir; I noticed the brand marks on them, 76 and 77, but of course I could not tell how long they had been in the track.

Q. What would it cost to replace with steel rails eight and one-quarter miles of track?

A. Do you mean simply for the rails?

Q. To buy the rails, ship them, and put them in the track.

A. I should have to figure that out. Of course I could estimate the value of the rails, eight and one-quarter miles of rails, and the approximate cost of laying.

Q. I wish you would give me approximately the cost of the rails and the expense of laying.

A. The cost of rails is not usually estimated by the ton; however, I can give you an approximate of it. It would be about $24,000.

Q. What do you estimate the rails to cost—$31 a ton?

A. Yes, sir.

Q. Delivered at St. Louis or delivered on the track?

A. That is somewhat of an estimate. Rails have gone down. I do not know what they are worth to-day; possibly a dollar a ton might be added. That would be 726 at $32. I do not know
167 just the current price of rails now. Rails can be bought at $26.50, and six months ago they were quoted at $27.50 and $28.

Q. What would it cost to lay them down?

A. I estimate laying down rails $150 a mile.

Q. Would you be willing to undertake a contract of that sort, to replace with steel rails of that character and lay them down for that sum?

A. Taking contracts is not my business. If I had any considerable amount of it I could do it.

By the MASTER:

Q. Does that include the spikes or fish-plates?

A. No, sir. I do not know exactly what should be added without going into considerable inquiry. I do not know to what extent the spikes there could he used again. The fish-plates and bolts would have to be new.

Q. Have you allowed anything for the old material taken up?

A. No, sir; I have not. I suppose, at present prices, I should add for the cost of the new fish-plates and bolts and spikes possibly $200 a mile. That would be $1,650 more. Then, of course, the old rails are worth a considerable sum, which I have not taken into the account. Adding the $200 a mile for fish-plates, I make $25,593. Just what should be deducted for the old material I cannot say. I suppose 80 tons to the mile, eight and one-quarter miles. The old material, I should imagine, would be 660 tons. I estimate you would not get over 80 tons. There is not so many old rails as you would require, for you would lay it with heavier rails. I suppose 660 tons is as much as you would get off of that; possibly you might not get over 75 tons, but calling it 80 tons, and estimating the value of the old rails there at $18, old iron rails, I think the price here is $20 or $22, you would have $11,880.

Q. Now, have you made an aggregate estimate of the amount of the repairs on the road needed now?

168 A. No, sir; that leaves $13,513 after deducting the estimated value of the old rails.

Q. You spoke of the grade of this road. Who told you what the grade of the road was?

A. I was told, and, as I say, it was hearsay. I was told by an engineer, who, I believe, got it from the chief engineer, that his reason for making the road so crooked was that he wanted to bring the maximum grade down to 53 feet.

Q. Do you know what the grade of the Wabash main line between here and Kansas City is?

A. I do not. I have seen the grade of the Omaha Division is reported to the census as 68 feet. I believe the grade of the Wabash main line is not reported in that.

Q. You do not know anything about the grade of the road?

A. I know nothing personally about the Wabash road.

Q. How do you form an estimate in regard to the life of steel rails?

A. It is the reported experience of others. I have never worn out any steel rails.

Q. Steel rails have scarcely been in use twenty years. Is there any definite number of years fixed?

A. Yes, sir. Steel rails are worn out in yards very frequently. Where the traffic is incessant a great many steel rails have been worn out. The life of a rail depends upon the amount of traffic that goes over it to a very considerable extent.

Q. What is the life of a steel rail in ordinary use?

A. Fifteen to twenty years is the usual estimate. By that I do not mean the life in yards, where they may wear out in two or three years; where they are run over incessantly, as in the yards.

Q. It depends upon the condition and laying of the track, the firmness of the track, and also upon the amount of wear they are subjected to?

A. It is mainly a matter of the tonnage that passes over them.

Q. You said the road was not ballasted. What do you mean by that?

A. That it is not filled in with gravel or broken stone on top of the road-bed.

169 Q. Are there any roads in the West ballasted that way?

A. I think the Missouri Pacific is nearly all that way, and my information is that the Chicago & Alton in Missouri is.

Q. Do you know that the Missouri Pacific is ballasted that way?

A. I think it is. The last time I was over it I noticed that a very large part of it was. It is not all. Of roads going out from here east I do not know of any one that is entirely rock-ballasted or gravel-ballasted except the Vandalia. I believe the Chicago & Alton is doing it, and there is some of it going on on the St. Joseph Branch.

Q. What is the character of the places where they are ballasting on the St. Joseph Branch?

A. They are ballasting their cuts to a considerable extent where they seem to be wet.

Q. Do you know the requirement for a ballast?

A. Of course they would ballast the worst places, which would be in wet cuts.

By Mr. STEWART:

Q. Do I understand you to say there is no part of this line that needs to have the rails renewed presently?

A. I said there was eight and one-quarter miles where they ought to be renewed as quick as practicable.

Q. Not more than that?

A. That is my estimate.

Q. What kind of rails is the eight and one-quarter miles laid with now?

A. The rails are very old and much worn.

Q. Steel or iron?

A. Iron, I think. Much of it seems to be the original iron. It is laid on chairs.

Q. On what part of the road is that?

A. It is on the parts I mentioned.

Q. Not continuous?

A. No, sir; and that eight miles, I should say, does not include the part from the junction to the river. I excepted that, and that should be added to it.

Q. Did you state the amount of trestle-work that should be
170 renewed presently?

A. When the work is completed which is in progress I should say that hardly any needs to be renewed. There are some trestles where the piles have been driven where the caps and stringers have not been put on. When they are put on the trestles need hardly any renewal.

Q. Did you make any estimate of the cost of the completion of the work now in progress?

A. No, sir; but it is no considerable proportion of the total amount of work that has been done.

Q. Could you give a rough guess? Would it take $10,000, $15,000, $20,000, or $30,000 to complete the work now in progress?

A. My judgment would be that to finish the work now in progress, to put in the timber they have there ready to put in, would cost less than $5,000.

Q. If this eight and one-quarter miles you speak of were replaced with new rails how long before any more replacements would have to be made with rails?

A. There would have to be a certain amount replaced all the time. The rails are not new on the rest of the road. They are good in comparison. It makes a fairly good track now. Of course, a certain proportion would be constantly wearing out.

Q. That you estimate is one-twentieth.

A. One in fifteen or twenty; of course, it is hard to say. It may be one-twentieth or one-fifteenth. I could not undertake to say.

Q. So far as the cuts are concerned, you say that all they need is to have the accumulations from the winter rains cleaned out?

A. That is what they mainly need. Some they are ballasting with stone that seemed to be springy and wet. That should be completed and the cuts should be cut out. Of course, if I wanted to make it strictly first class I should ballast it throughout.

Q. Is the line ditched at all?

A. The ditches are filled up now.

Q. Has it ever been ditched?

171 A. I should say it had. In the present condition the ditches are full with the exception of some they are opening out.

Q. Have you any idea of the cost of putting these ditches in good order?

A. I cannot say I have. It is about the ordinary amount of work that is necessary to open the ditches every spring.

Q. It is necessary for a good road-bed that it should be ditched?

A. Yes; of course the ditches have to be opened every spring on a road of that sort.

By the MASTER:

Q. You spoke of the embankments not being as wide as usual and of their being widened out in places. What is the condition of the road in that respect?

A. The banks are too narrow, and they need to be widened pretty generally.

Q. Why should that be necessary? What advantage would be gained by widening?

A. It makes a better road than as it is now. It would be more economically operated if the banks were made wider.

Q. Do you remember what is about the average width?

A. I should say they would not average now over twelve feet.

Q. Does it appear to have ever averaged more than that?

A. Yes; I suppose it has wasted away to its present width. The banks always do that. It may have been built the usual width originally, but railroad embankments always need to be widened in the course of time.

Q. Are there any considerable settlements along the line of the road between the junction and St. Joseph?

A. At Richmond I was told they had about 4,000 people.

Q. How far is that from the junction?

A. Four miles.

Q. Are there any other considerable towns?

A. No considerable towns. There are several towns I should suppose from 800 to 1,000 people. The town of Lawson seems
172 to be a sprightly sort of a town, and the town of Vibbard. The town of Lathrop is a good town. Plattsburg is the county-seat. I do not know the population; 3,000, I imagine. There is the town of Agency Ford and the town of Gower, which seems to be a pretty thriving town. The town of Agency Ford, from what I could see, is not a town of much importance.

Q. Did it seem from the alignment of the road and the general appearance that it had been built in a way to reach around and take in the settlement or built with a view of securing a good alignment and easy building?

A. I imagine that most of the settlements have taken place since the road was built. I think that is true of Lawson. Of course it is not true of Plattsburg.

Q. That is true of Gower?

A. Yes, sir. As regards Lathrop, I do not know whether it has grown up since or before. I am inclined to think that Lathrop is older; I do not know.

Q. Do the towns seem to be in as good repair as the road?

A. Yes, sir; some are thrifty—Lawson, Gower, and Vibbard. Richmond seems somewhat decayed.

Q. What are the facilities for handling freight and accommodating passengers in St. Joseph?

A. The freight yard seems to be quite a commodious freight station, with ample freight tracks. They run into the Union depot, which is ample for all purposes for the passenger traffic.

By Mr. CRANE:

Q. State, if you remember, what has been done at the freight depot in St. Joseph.

A. It has been extended. I made a note of it as being in good order; about fifty feet added to the east end. It is quite new.

By the MASTER:

Q. Taking into consideration the fact, which is, of course, known as a matter of history, that this railroad is an insolvent corporation and passed into the hands of the receivers last May,
173 what is your opinion from what you saw on your recent visit there as to whether the property has been neglected by the officers of the court during the last ten or eleven months?

A. I should say that there had been no neglect during the last year, but, on the contrary, there had been very commendable zeal in putting it in good order, and the expenditures had been made with very good judgment.

Q. Now, if the receipts there from freight or passenger traffic have not been large during those ten months, would you, in your judgment, attribute that to the bad condition of the property or the unfavorable location of the road?

A. Well, it might not be either; it might be the unpropitious times.

Q. Are there any facts in your knowledge as an experienced engineer which you can give us—or opinions, for that matter—with reference to how long such unpropitious times are likely to continue?

A. No opinion is of much value on that. The country seemed quite productive. I should think that it would support a road.

Q. What is the best test of that question—whether a country will support a road or not?

A. Of course there is no test as conclusive as experience.

Q. Then if at the present time, taking the road in the condition in which you saw it, it should not and has not during the last few months paid its operating expenses, to what cause would you attribute that condition of affairs?

A. I think during the last few months the operating expenses or the expenses put on the road have been much greater than the normal operating expenses will be. This renewal of bridges will not occur again for six or seven years.

Q. But these expenditures were made, I suppose, before the opening of the winter, were they not?

A. I suppose so. It would be bad to do much work during the winter.

174 Q. If during the winter—say December, January, and February—the road did not pay the operating expenses for those months, what would be the cause of it—why would you find such a result as that?

A. I understand, with reference to the last winter, that the expenses of operating all roads in this part of the country have been unusually great. The winter has been very severe. I think February on all roads has been a very disastrous month and would hardly be an index to anything. The expenses of such times as these ought to be a pretty fair index of the capacity of the road.

Q. I understand, then, from you that from what you saw on your recent visit over that property there are no indications of neglect on

the part of the officers of the court in the care of the property during the last ten or eleven months?

A. None at all. It has been very well cared for.

By Mr. CRANE:

Q. I do not remember whether you stated in your direct examination or whether you have subsequently whether the passenger trains of that road run into the Union depot at St. Joseph?

A. I believe they do. I went on a freight train, which did not.

This was all the testimony introduced on the part of the intervenor.

At this point the further hearing of the case was adjourned until 11 a. m. April 8th, 1885.

Pursuant to adjournment, as above stated, on April 8th, 1885, the hearing of the case was resumed, as follows:

Present: Messrs. Pattison & Crane, solicitors for the intervenor, and H. S. Priest, Esq., solicitor for the receivers.

J. F. How, being duly sworn, testifies as follows:

Direct examination by Mr. PRIEST:

Q. At present you are the general agent for the receivers,
175 Messrs. Humphreys & Tutt, and have been since their appointment?

A. Yes, sir.

Q. Prior to that time what official relation or connection did you have with the Wabash, St. Louis & Pacific Railway Company?

A. Immediately prior to that time I was its secretary or assistant secretary.

Q. How long in various official relations have you been connected with the Wabash Railway Company or a constituent of the consolidated company?

A. About fifteen years and a half.

Q. Prior to the consolidation and formation of the Wabash Company you were connected with the St. Louis, Kansas City & Northern Railway Company?

A. Yes, sir.

Q. The company which leased the St. Joseph & St. Louis railroad?

A. Yes, sir.

Q. And you have been ever since that time connected with it?

A. Yes, sir.

Q. I will get you to state since the making of that lease by the St. Joseph & St. Louis to the St. Louis, Kansas City & Northern Railway Company how the accounts of the earnings and the expenditures of that particular line have been kept.

A. An accurate account of the earnings of the line has always been kept. No account of the expenses of the line was kept until after the road passed into the hands of the receivers.

Q. What was the condition of the road, if you know, at the time of the execution of the lease?

A. Quite poor.

Q. I will be glad if you will give the master a general idea of that road and the difficulties of operating it.

A. As regards the earnings of the road, it takes a large volume of business to get any amount of earnings of any magnitude at all. For instance, you would probably have to carry 50 per cent. or more of business on the St. Joseph road to get the same amount of earnings that you would get from a certain number of tons hauled
176 the same distance on some other road which does not have to contend with the difficulties the St. Joseph road has. The reason for that is this, the road is crossed at Lathrop by a competing road and at Plattsburg by another. They have several competing roads in St. Joseph and the river to compete with at Lexington Junction, and the consequence is that there is not a point on the road where the maximum haul of a competing road is over twelve miles, and therefore all of the business is substantially competitive, and competitive business means for a railroad reduced rates. Then the country through which the St. Joseph road runs, though it is a very rich country, still there is very little grain, comparatively, shipped from that road. They raise a great deal of stock there, and the consequence is that instead of shipping five car-loads of grain they probably ship one car-load of stock as the product of the grain. That, of course, reduces the amount of earnings which a person would naturally expect to get from the country along the road.

Q. In the proportion of one to five?

A. Yes, sir. The coal business is quite a large proportion of the business of the road.

Q. I want to ask you about the character of the farms there—whether they are large grain farms or large stock farms.

A. They are large farms and have a great deal of stock, and grain is raised to put into stock.

Q. Now about the coal.

A. As I was saying, there is a great deal of coal on the road, but the revenue from the coal is very small. You have to do an immense amount of business to make any show in the earnings. Now, as to the operating expenses of the road, it is a very crooked road, and while the curves may not be unusual in the road they come so frequently it makes it very difficult to operate it and the grades are quite heavy. The banks along certain portions of the road
177 are very treacherous, being underlaid with a soapstone formation, which causes a slide of the banks without any previous warnings and makes it very expensive to repair. I think there is one mile of the road that has cost, to my certain knowledge, $15,000 or $20,000 to overcome that difficulty during the time since the lease was made. These grades and curves make it very expensive, of course, in hauling trains over the road. We can only haul a maximum train of thirteen cars, while the Kansas City, St. Joseph & Council Bluffs road, which is a competing road out of St. Joseph, can haul sixty cars to a train. It takes with us nearly five times as

many engines, with the expense of running the engines and expense of trainmen, to haul the same number of cars that the Kansas City, St. Joseph & Council Bluffs road would haul with one engine in one train. Now, as to the passenger business, in order to compete successfully with the Missouri Pacific road for through passenger business we would have to run a through car from St. Joseph to St. Louis as they run a through car from St. Joseph to St. Louis. They are enabled to do so by utilizing the St. Joseph car for their Leavenworth and Kansas City travel, while we have to start another car from Kansas City and really run two cars to accommodate the travel that the Missouri Pacific can accommodate with one car. Running a sleeping car from St. Joseph to St. Louis is a very expensive piece of business. We tried it for a year and discovered we did not take in enough additional money. I believe the result was that we did not take enough money from through travel from St. Joseph to pay for the expense of running the sleeping car.

Q. What is that expense?

A. That car would have to run 600 miles a day and we would have to pay for 600 miles to the Pullman Car Company at three cents a mile, to say nothing of repairs to the sleeping car, a
178 portion of which we would have to keep up under the contract.

Q. Leavenworth is quite a large place?

A. Yes, sir.

Q. And Kansas City is the center of the exchange for passengers going east and west from that point?

A. The travel from Kansas City is almost as important as from any place in the country.

Q. How about the practicability of running a sleeper from St. Joseph to R. and L. Junction, and then exchanging passengers with the main-line trains from Kansas City to St. Louis?

A. We also made that experiment, but it was very unsatisfactory to the people, and, of course, as any one can readily see, a person would rather get into a car at St. Joseph and go to St. Louis then change cars and wait around at R. and L. Junction for the train to come from Kansas City. We found that was not practicable at all.

Q. Now, with regard to the ability of the Wabash line over this St. Joseph line to compete at St. Joseph for the business going east and the business going west at that point with the Chicago, Burlington & Quincy, Chicago & Rock Island, the Hannibal & St. Joseph roads, and also the Missouri Pacific road, is it a fact that each of these other roads have western connections by which they are able to accommodate the jobbing trade from St. Joseph into Kansas and Nebraska and other points which the Wabash has not?

A. No, sir; that is not so.

Q. The Chicago, Burlington & Quincy road has lines extending into Nebraska and Kansas?

A. Yes, sir.

Q. The Chicago & Rock Island has also, has it not?

A. Not out of St. Joseph; the Chicago & Rock Island and the Missouri Pacific have not.

Q. The Missouri Pacific has with the central branch of the Missouri Pacific?

A. That is not controlled by them. We can get as much
179 of that business and can contribute as much to it. We have equal facilities with the Missouri Pacific, with the St. Joseph & Western.

Q. Some complaint has been made in the testimony about your discontinuing your efforts for business at North Lexington. You may state the circumstances leading to that course—what reasons influenced the management of the Wabash road.

A. We were doing business out of Lexington until I can't remember exactly when, a few years ago, and also out of Atchison, and the Missouri Pacific and the Wabash about then entered into an agreement the understanding of which was that we were not to try to get business from either of those points on condition of their staying out of St. Joseph.

By Mr. CRANE:

Q. Was that in writing?

A. No, sir; at least I never saw it. The business of St. Joseph was much more profitable to us than the business from either of the points mentioned. That agreement lapsed and terminated a great while ago by the Missouri Pacific getting a connection into St. Joseph. The business from Lexington was not a profitable business to us. We had to pay large commissions for any business we got out of there. We were working against obstacles that it was almost impossible to overcome, the Missouri Pacific having a direct line in there and we having to transfer by ferry. The business was never profitable, but it was sufficient for us to hold over the Missouri Pacific and get some terms from them at other points. We could bother them more than we could help ourselves.

By Mr. PRIEST:

Q. I will get you to give the gross earnings, if you have them at hand, of the St. Joseph & St. Louis Branch for the months ensuing the receivership since May 29th, 1884.

A. The gross earnings from May 29th to January 31st were
180 $116,851.10; the expenses were $177,612.01, showing a deficit of $60,760.91. The gross earnings of December were $16,302.73, and the expenses, leaving out taxes and any extraordinary expenses, were $20,196.54, showing a deficit, without deducting taxes and extraordinary operating expenses, of $3,893.81. For January the earnings were $16,904.10, and the expenses were $18,608; that includes everything, showing a deficit of $1,703.90. The operating expenses for December and January are of course less than they will be after the first of April or May because very little work is done on the road during the winter months as far as the maintenance of the way is concerned.

Q. I will ask you a general question. What efforts could be put forth by the receivers in the management of this particular road

which they have not exerted that would enable it to yield a greater revenue?

A. I do not know of anything that will enable it to yield a greater net revenue.

Q. And, taking everything into consideration, what is your opinion as to the possibility of the railroad earning enough to defray the expenses of operating it?

A. I do not believe the road can do it.

Q. I will be glad if there are any other facts suggested to your mind in connection with the road or with its operation or with its future that you have not mentioned that now occur to you, if you will state them.

A. Well, as some suggestions have been made, whether before the master or outside I am not certain now, that the receivers should have notified the officers of the road at once on taking possession of the property that the road was unprofitable, I think it is due to make some explanation in connection with that.

Counsel for the intervenor objects to any testimony concerning notification or non-notification as irrelevant and incompetent in the case. Objection overruled.

The WITNESS: I simply wish to say that when the re-
181 ceivers took possession of the Wabash property, as the operating expenses of the St. Joseph line had never been kept separately, it was impossible to form anything like an approximate estimate which would be correct as to what those expenses were. While we may have thought that the road was unprofitable, we had no figures with which to back the opinion. As long as the Wabash was in sound credit it had to pay rental on the St. Joseph road, which was thirty per cent. of the gross earnings, regardless of whether there were any net earnings on the road or not. It takes about two months to arrive at the earnings of the branches after the close of the month.

By the MASTER:

Q. Explain that.

A. There is a great deal of figuring connected with it. It takes about a month to get at the net earnings of the main line, and then as soon as that is done we take up each branch and of course every pay-roll and every voucher has to be analyzed before we can arrive at the earnings of the branches. It was not until the end of August that we were able to say what the earnings of this branch and other branches were in May. Shortly after we arrived at the first month's earnings of the road, which were shown by us to be less than the operating expenses, the rental under the lease fell due and certain parties connected with the St. Joseph road were then notified that we were doubtful whether the road was making its operating expenses. Another month showed the same result, and we then gave them official notice that we would be unable to pay the rental.

By Mr. PATTISON:

Q. Was that in writing?

A. No. I told Mr. Nisbet that myself—that we would be unable to pay the rental, as the road was not earning its expenses.

By the MASTER:

Q. When was that?

182 A. It was in October. He said he had had already some conversation with Mr. Humphreys before he saw me, who had made the same statement to him. As regards the value of this road to the rest of the system, I will say that we have had a statement made up to the first of January since the appointment of the receivers for seven months of the earnings derived by the rest of the system from business originating on the different branches. The gross earnings which the rest of the system realized from business originating on the St. Joseph Branch was $100,434.37. Calculating that it only costs us sixty per cent. to do that business, which is a good deal less than it has cost us to do the entire business of the road and which is a great deal less than our general manager and general traffic manager think the business can be done for, still, taking that for the calculation, the earnings of the rest of the road would be about $40,000, which is considerably less than we have lost in operating the St. Joseph road; so that, even taking into consideration the net earnings of all the business that the road furnished, we are still out a good many thousand dollars in operating the St. Joseph Branch.

By Mr. PRIEST:

Q. In all these calculations in which the deficit is shown the rent is not calculated?

A. No, sir.

Q. The deficits are deficits aside from the rental of the road?

A. Yes, sir. I have not attempted to analyze the expenses of the road, believing that you were going to take testimony from Mr. Talmage and Mr. Lincoln, who have both a great deal more practical experience in these things than I have, and their testimony would be more valuable.

Cross-examination by Mr. CRANE:

Q. You are secretary of what road?

A. I was secretary of the St. Louis, Kansas City & Northern Railway Company.

Q. How long did you remain secretary of that road?

183 A. I remained secretary of the road until the consolidation with the Wabash. I held also other positions in the road at the same time I was secretary.

Q. What other positions?

A. I was vice-president of the road for a portion of the time and afterwards of the Wabash, St. Louis & Pacific Railway Company.

Q. What office had you with the Wabash after the consolidation?

A. I was secretary and also part of the time vice-president.

Q. Mr. Humphreys was in the board of directors of the St. Louis, Kansas City & Northern Railway Company when the lease was signed?

A. Yes, sir.

Q. Who is now one of the receivers?

A. Yes, sir.

Q. He was connected with the Wabash, St. Louis & Pacific Railway Company until he was made receiver?

A. Yes, sir.

Q. Mr. Tutt was also a director of the St. Louis, Kansas City & Northern Railway Company?

A. No, sir.

Q. Mr. Tutt was of the Wabash, however, after the consolidation?

A. Yes, sir.

Q. And served in that capacity up to the time he was appointed receiver?

A. Yes, sir.

Q. At the time you were secretary of the Wabash road you were also secretary of the Missouri Pacific, were you not?

A. No, sir; I was assistant secretary of the Missouri Pacific for about a year prior to the appointment of the receivers.

Q. Were you not secretary of the Missouri Pacific road at one time?

A. No, sir.

Q. I thought you had a letter-head on which that was stated?

A. No, sir; I was assistant secretary.

Q. You were assistant secretary of the Missouri Pacific at the same time you were secretary of the Wabash?

A. Yes, sir.

Q. Assistant secretary of one and secretary of the other?

A. Yes, sir.

184 Q. Those roads were run in the same system?

A. Yes, sir.

Q. Under practically the same management?

A. The same parties held the same positions in a great many cases in each.

Q. The management was directed and controlled by the same parties?

A. Yes, sir.

Q. I believe it is true that you signed the intervenor's lease?

A. As secretary of the St. Louis, Kansas City & Northern Railway Company I think I did. I have not looked at it for a great while.

Q. All of these Western roads have more or less competition, have they not, whether branches or main lines?

A. Yes, sir; some have a good deal, more or less.

Q. The whole northwestern part of the State north of Kansas City is a perfect net-work of railways, is it not?

A. No, sir; I do not know of a road of the same length or of much greater length that has as much competition as that road has.

Q. Are you familiar with all the roads up there?

A. I am familiar with a great many of them.

Q. Could you state what competition each particular road has?

A. Not at this time.

Q. As a matter of fact, is there any road running out of St. Joseph that has not direct competition by lines crossing it?

A. Yes, sir; take the Hannibal & St. Joseph, for instance. It has from Hannibal to St. Joseph, I think, only three lines crossing it, two of them controlled by one company, the Wabash, and that is a very long distance. Take the Kansas City, St. Joseph & Council Bluffs, and I think it only has three competing points between Kansas City and Council Bluffs.

Q. That makes a very long haul between those points at a low competing rate?

A. Yes, sir; but it gives a good deal of business.

185 Q. It makes a strong line for local business, having a large business with three competing points?

A. Yes, sir.

Q. It is a very common thing for all roads to cross and recross other lines between their extreme terminal points?

A. Yes, sir; but the oftener they are crossed the more the value of the road is decreased.

Q. Take, for instance, the great through lines. Take the — betwe-n Fort Wayne and Chicago. They are crossed twenty-one times and they have to stop pretty often.

A. They have to stop pretty often. The local business and not the competitive business is the profitable business of a road.

Q. That is true of all road-?

A. Yes, sir; the less local business and the more competitive business a road has the worse off it is.

Q. With respect to the sleeping cars on the road, the statement you have made that it costs three cents a mile for 600 miles to get from St. Joseph and return is true of the Pullman cars?

A. It is true of any sleeping-car company.

Q. Is that true of the car the receivers have put on recently that is advertised so extensively in the papers?

A. That is our own car.

Q. That could have been put on before?

A. Yes, sir; but we do not know how it is going to pay.

Q. I say that it could have been put on before?

A. I say I do not know whether it will cost more than three cents a mile or not. The way they arrived at three cents a mile is supposed to cover the expense of running a car. We pay them enough to hold them harmless from any loss, and they make a profit on the passengers they carry. We had arrangements where we obtained the sleeping car, and we found it came to the same thing. I have no doubt it will cost us three cents a mile.

Q. Still you are putting it on when you know it was a
186 failure before and incurred a loss?

A. Yes, sir; but we are putting on a different kind of car now, a kind of combination car.

Q. Part chair and part sleeper?

A. Yes, sir.

Q. You say that no statement had been preserved of the expense of operating the St. Joseph Branch separate from other expenses of the general system prior to the time the receivers took charge?

A. Yes, sir.

Q. Was it generally believed by the officers of the company that the road was making money?

A. No, sir; it was generally thought we were losing money.

Q. You kept it?

A. We did not see how we could get out of it.

Q. Did you attempt to surrender the lease?

A. No, sir.

Q. Were you asked to surrender the lease?

A. I have never heard of a proposition to surrender the lease since I have been connected with the company. On the contrary, Mr. Lionberger, who represented the company out here, wanted us to guarantee five per cent. bonds in place of the stock. That matter was referred to me, and I think I can find the letter in reply to the letter that was sent to me, saying I did not think we could afford to pay it.

Q. As a matter of fact, your judgment was it was better to run the road at a loss than to abandon it?

A. No, sir; my judgment has been, and I know, as far as the active officers of the road, their judgment has been, it would be better not to have it.

Q. Didn't you tell Mr. Nisbet that the receivers could afford to pay $25,000 a year and get no return from it rather than to abandon the road?

A. No, sir; I told him that the question might come up that it might be better to lose some money in operating the road rather than to lose it.

Q. That is your memory of the conversation?

A. I can swear to it.

187 Q. What consideration was given to you by the Missouri Pacific in case you would abandon the competitive business at Lexington and Atchison?

A. That they were to stay out of St. Joseph.

Q. Did they keep their part of the bargain?

A. They did for several years.

Q. How many years?

A. I do not remember exactly when it was made.

Q. How long did they keep out after the two roads came under the same management?

A. It ended before that.

Q. There was direct competition before the two roads came into one management?

A. Yes, sir.

Q. In the meantime you had permitted to die under the terms of your arrangement the business at Lexington and Atchison?

A. Yes, sir; which I never thought was profitable, which I think figures will show.

Q. You have stated that the business from St. Joseph was more profitable than the business from Atchison and Lexington. You thought there was some profit in the St. Joseph business?

A. Yes, sir; I thought so. I confess I am surprised to see that the road is as bad as it is. I thought it was not profitable, but I did not think it was bad as it is.

Q. The Wabash Company owns some property at St. Joseph?

A. Yes, sir.

Q. I believe you purchased some property there?

A. Yes, sir.

Q. That is, contiguous to the depot?

A. Yes, sir.

Q. How much property is there there?

A. In the neighborhood of $20,000 worth.

Q. That is about the half of two city blocks and the fourth of a third city block.

A. I think probably about that much. It is in the suburbs, and we paid about $20,000 for it.

Q. For what purpose was that bought?

A. At the time we bought it the idea was we could make
188 arrangements with the St. Joseph & Western, which was then controlled by the Union Pacific, to have a common or Union freight depot for the two roads there. They were to pay for their proportion not only of this property, but other property there. There was to be a valuation fixed on it, and they were to pay a portion of it. I had an interview with Mr. Sidney Dillon in New York about the matter, and he thought there was no difficulty in putting it through. As the result of the conversation I was authorized to buy the property. The matter was never consummated.

Q. The property is contiguous to the St. Joseph yard?

A. No, sir.

Q. What separates it, if you know?

A. Our grounds.

Q. The Wabash property is next to the St. Joseph property.

A. The St. Joseph & Western road can run right into the Wabash property, but they have no property.

Q. That was about eighteen months or two years ago that was bought?

A. Longer than that, I think.

Q. You have paid taxes on it two years?

A. It was about, I think, nearly three years ago.

Q. Is not the last tax bill you have paid only the second one you have paid on the property?

A. I could not be certain about that. I am very certain it was three years ago we bought the property.

Q. And that purchase was made with the expectation of increas-

ing your terminal facilities at St. Joseph by building a large freight depot with the St. Joseph & Western?

A. We thought we could reduce our expenses; that we would have another partner and have more ground, and by using that we would reduce our expenses. I understood you to mean that the proper was next to the St. Joseph & Western; it is right near to the intervenor's property.

189 Q. While we are at St. Joseph, in the freight yard, permit me to ask if it is not true that the Wabash Company, the lessee of that road, has added within the past few months nearly fifty per cent. to their freight depot there?

A. That is a matter I cannot speak of advisedly. I heard so from you.

Q. Is that the only knowledge you have?

A. Since then I have asked Mr. Lincoln, and he told me that a very cheap addition had been put up.

Q. Of the same quality as the rest of the depot?

A. I do not know anything about that.

Q. Who gave the orders for that enlargement of the depot?

A. That I could not say. I suppose Mr. Talmage.

Q. You had nothing to do with it?

A. No, sir.

Q. Naturally the object of increasing the depot was to afford opportunities for doing a larger business?

A. Yes, sir.

Q. In considering the gross expenses for December and January have you on that paper from which you read a moment ago any distribution of expenses showing to what particular class they belong, whether for maintenance of way?

A. Yes, sir.

Q. Please read it.

A. For December, for conducting transportation, $7,117.35; for motive power, $6,123.74; for maintenance of way, $5,977.07; for maintenance of cars, $708.52; for general expenses, $269.86.

Q. Please read the same items for January.

A. Conducting transportation, $6,990.62; for motive power, $5,853.72; for maintenance of way, $3,798.20; for maintenance of cars, $771.69; for general expenses, $249.33.

Q. You observe, then, from this that the charges for conducting transportation and motive power are respectively greater than for any of the six months preceding those two months. Why is that?

A. For motive power, of course. In December and January you would burn more coal and you would haul not as heavy loads with your engines, and that increases the number of engines you would have to do the same amount of work. That increases the motive power.

190 Q. Can you assign any other reason?

A. If we have to do any more business we have to haul more cars. That could be analyzed and shown, and if we hauled more cars to get the same gross earnin-s, why, of course, we would increase the expense.

Q. Go on.

A. I do not think of anything else.

Q. Now it comes to the question of maintenance of way. What extraordinary expense in December and January did you have over the previous six months? Why should the expense be greater?

A. It should not be as great.

Q. You have a statement before you, have you not, in which the charge for conducting transportation is analyzed into the expenses in detail?

A. I have not got it with me. It was made.

Q. You have a statement submitted to you regularly week by week of the business done at St. Joseph compared with the business of a similar period of last year?

A. I do not see those statements. There are such statements furnished.

Q. They have been prepared?

A. I occasionally see them.

Q. Do not those you have seen show a large increase in business?

A. Those I have seen do not; they are about the same.

Q. Would it not be a good idea to present a statement here; would it not inform the master of the character of the business, and, if it showed a growth, show the growth; and, if it showed a deficiency, show the deficiency; if such statements were gathered by you?

A. Those statements may be very misleading to you and misleading to persons who have a great deal of experience.

Q. You could explain them?

A. I could not explain them as well as some others could. The business which originates at a station, while it may apparently show large earnings—the earnings from the business may look very much larger than the year before, yet really may go less than the year before. The reports show the amounts started from the sta-
191 tion, and if hauled to Toledo the earnings are larger than if hauled to St. Louis. The earnings might look very much larger than another month when the freight is only hauled a short distance and really the road be getting no larger revenue from it. It depends on the destination of the freight. The same way from the receipts of freight. A man may collect $60 or $100 from a car and swell the business of the station, but still the road might not get over $10 of it.

Q. If the gross receipts in January, 1883, should be $500 and in the month of January, 1884, $1,000, that would show an increase in business, would it not?

A. Not necessarily; it might show the business has gone to different localities; that we may have gotten more business, but the road might not have gotten more money.

Q. Right on that question of what the road might have got. Usually when a branch line from a main trunk line gives an opening from that trunk line to some terminal point the arrangement for the distribution of the earnings is based upon a consideration of the cost of distributing that freight at the terminal point, is it not?

A. Well, there are a great many things to be taken into consideration with that.

Q. That is usually true?

A. Not usually; it is very often true.

Q. Is it not true in this case?

A. No, sir.

Q. Under this lease the branch has a ratable part of the freight earned by carrying a certain amount of freight over your road or such proportion as necessary to take it to its destination?

A. Yes, sir; except the local business.

Q. If your road is 308 miles long from St. Joseph to St. Louis and a car-load of freight is shipped from St. Joseph to St. Louis, it would traverse 72 miles of this road and go on the rest of the way to St. Louis?

A. Yes, sir.

192 Q. And we get $\frac{72}{308}$ of the freight?

A. Yes, sir.

Q. Usually where the circumstances are the same and the branch line, as I said before, gives access from a main line to a terminal point, and the freight at the terminal point has to be loaded or unloaded, as the case may be, a larger proportion than its proportion to the mileage of the main line would be allowed it for the freight?

A. Very often that is the case.

Q. It would be unjust if such were not the case.

A. I think you have to take into account the length of the haul and the kind of business and the fact of where the most of this business goes. A great deal of business arising in St. Joseph goes to Detroit or Chicago. It is only hauled over our road a little distance from there.

Q. How is that?

A. To Moberly.

Q. Does your road only run to Moberly?

A. The Detroit and Chicago business goes that way.

Q. Suppose that a car-load of freight is shipped from St. Joseph to Detroit?

A. It goes to Moberly.

Q. And it goes over the line leased by the Wabash system?

A. Yes, sir.

Q. Suppose it should go by the trunk lines, with which we are more familiar, and we had to load that car, you would charge us with loading that car?

A. You mean from St. Louis to St. Joseph?

Q. No, from St. Joseph to St. Louis.

A. Yes; we would charge you with that.

Q. And you would only allow us $\frac{72}{308}$?

A. Yes, sir.

Q. Our proportion would be more than used up by the cost of loading if it was a bulky article?

A. No, sir.

Q. It would come pretty close to it?

A. Yes, sir; but if we give you the benefit of all your net freight, you are helped.

By Mr. PRIEST:

Q. Wasn't there a rate of distribution fixed on this line
193 for freight as on several other lines?

A. No, sir; not by Gault and Tucker.

By Mr. CRANE:

Q. The lease fixes it?

A. Yes, sir.

Q. Do you know whether the main line of the St. Louis, Kansas City & Northern earns more than its fixed charges and interest?

A. Yes, sir.

Q. And more than the fixed charges and interest on the bonds at the time of our lease?

A. Yes, sir; it has.

Q. In summing up the expenses and collating them, as you say you have been doing since the receivers took charge of the road, you are accustomed to divide them into various groups—say the conducting of transportation, motive power, maintenance of ways, maintenance of cars, and general expenses—and then each one of these groups is again subdivided into advertising agents, baggage-master, cleaning cars, &c. Now, how much, in your opinion, would the general expenses be lessened if the road was lopped off?

A. Fully the amount that is charged up against the road, if not more.

Q. It is true that in many instances under the system you have adopted and that was presented to you for distributing the operating expenses of the branch lines you charged up to this branch line the repairs done at certain of the shops on the main line to each of the locomotives, whether they are run on the branch or main lines, the proportion being as the general expenses of locomotives is, so the miles run by this locomotive is to the entire sum. That is true, is it not?

A. Yes, sir.

Q. Then if a locomotive on the St. Joseph Branch has run for the entire six months without going into the Moberly shops she is, nevertheless, charged with some proportion of the work done in the shops?

A. If such a thing happened she would be.

Q. If there were eight locomotives and none of them had
194 been in the Moberly shops they still would have borne some parts of the expenses done in the Moberly shops?

A. That would be so, but that is something not likely to happen.

Q. That would be the fact if it did happen?

A. Yes, sir.

Q. Have you any record to show what repairs had been done to the locomotives on the branch line?

A. Yes, sir.

Q. Have you that to present to the master?

A. No, sir.

Q. Did it not occur to you that it would be the best way of getting at the facts?

A. No, sir; it occurred to me that the method we have adopted was more liberal to the branch lines than to the main line. I will lease it to any railroad expert in the country if it is not so.

Q. Would it not be better to leave it to the facts?

A. No, sir.

Q. That is true also of that system of distributing operating expenses—that is true of flat cars and box cars?

A. No; it is not true. That is divided in proportion to their earnings. They pay their proportion according to the earnings.

Q. Suppose we do not earn anything?

A. Then we would not pay anything.

Q. Suppose we earn less than the main line?

A. As the gross earnings on your line compare with the gross earnings of the whole system you pay. It is almost impossible to arrive at it in any other way. The car may be on your road to-day and to-morrow on some other line.

Q. Going down to the question of expenses, we are charged with a ratable part of office clerk, stationery, insurance, incidental expenses, expenses of the legal department, and things of that kind. Would not that expense still go on if the railroad was lopped off?

A. No, sir.

Q. Then nothing would be saved to the main line in the way of general expenses by cutting this off?

195 - A. I say it would all be saved. Everything we have charged there would be saved, and more.

Q. What more is there that is occasioned by our line than you have charged us for?

A. I think we have given the advantage to the branch line. Wherever there is a doubt I think we have given them the benefit of the doubt.

Q. Take the depot at Lexington Junction, what rent is paid there?

A. We pay no rent.

Q. Does not the Wabash Railway Company pay some rent?

A. We own the depot.

Q. What do you charge us?

A. Nothing. I do not believe that you could get the station agent to work there for one-quarter of what we pay him there.

Q. What do you pay him?

A. $90.

Q. What would be one-quarter?

A. $22.50.

Q. Could you get an agent to do your business there for $68?

A. Yes, sir.

Q. Get a responsible agent at that place?

A. Yes, sir; we get a good many at points not connecting points for $50. We do not charge anything for the rent of the depot. We

have been too liberal to the branches; not to the St. Joseph Branch, but to all branches.

Q. Now, the old North Missouri that leased this road originally paid at the rate of six per cent. on a million bonds?

A. It agreed to, but did not pay.

Q. That was the estimate of the value of the road at that time?

A. Yes, sir.

Q. Are any of the leases of the other branch lines of earlier date than ours?

A. I could not tell without refreshing my memory. I think there are one or two of them.

Q. West of the river?

A. Yes, sir; I think the Columbia Branch—no; none of them.

Q. This is the earliest in point of date?

A. Yes, sir.

196 Q. I think you stated in your direct examination that this was a very crooked road?

A. Yes, sir.

Q. What is the heaviest curve on the road?

A. I could not say.

Q. Is it an excessive curve?

A. Well, Mr. Moore is better authority on that than I am. It seems to me it is an excessive curve. When you see a town on one side of the car and in a short time see it on the other side there is a curve there. I am speaking as a practical man.

Q. On the trunk lines you see the sun strike you on one side and then you are in the shade?

A. Not quite as rapidly as it is done on this road.

Q. Is it not true of the Missouri Pacific road between here and Jefferson City?

A. I do not think the curves are so frequent.

Q. Do you know anything about the Missouri Pacific near Glencoe?

A. Yes, sir.

Q. That is quite as full of curves as this road?

A. It strikes me that they are not so bad.

Q. You did not ride over the road in the day-time?

A. I have ridden over both of them in the day-time.

Q. You are speaking not with any technical knowledge?

A. No, sir; only judging.

Q. You also stated that there was one mile that cost $15,000 or $20,000 to maintain it for a year. That, of course, is a mile that is frequently referred to by those being familiar with the road as being a cut where there is a quicksand?

A. A soapstone foundation.

Q. And the thing fell out?

A. Yes, sir.

Q. That was an accident or freak of nature; as if a freshet washed down a bridge?

A. That came right often.

Q. In that year?

197 A. Not in that year. You misunderstood me if you understood me to say it cost $15,000 or $20,000 in one year. I said it cost that to keep it up.

Q. You put $15,000 or $20,000 in it?

A. Yes, sir.

Q. How long ago was that?

A. I could not tell when it commenced to slide. I think it has been within the last five or six years that we spent that amount.

Q. Do you know when the Missouri Pacific got its direct line into Lexington?

A. I cannot remember.

Q. Can't you give me a general statement of when it was?

A. Within the last two or three years.

Q. As I understood you, the business at Lexington had been abandoned that time?

A. Yes, sir.

Q. What connection had the Missouri Pacific into St. Joseph?

A. I beg your pardon. They have had their line into Lexington a good many years.

Q. Can you pick out 72 miles in the Wabash road between here and Kansas City or anywhere else in its system which pays its operating expenses or would pay them if chopped off at both ends? Take a section of 72 miles right out of the road anywhere, can you find any section that would pay its operating expenses?

A. You mean if no connection or no town was at either end?

Q. Yes.

A. I do not know. I give it up.

Q. Take the road as it exists now, is there any 72 miles in the whole system that pays its expenses?

A. Yes, sir.

Q. Where is it?

A. Take the St. Louis, Council Bluffs & Omaha road, which is 42 miles long, it pays its operating expenses.

Q. Take the Wabash main line.

A. I think the 72 miles out of Kansas City will pay it, and I think the 72 miles out of Chicago pay.

Q. 72 miles from Kansas City would bring you about where?

A. About Brunswick; maybe a little west of Brunswick.

198 Q. The business between Brunswick and Kansas City—the local business—then, pays?

A. I think so; not the local business. I say through business and all. I think the 72 miles running out of Kansas City, running out of Chicago, and running out of St. Louis pay.

Q. That is natural because they run out of populous cities?

A. The 72 miles out of Indianapolis pays.

Q. There are sections of 72 miles in various places on the Wabash that do not pay?

A. I should imagine so.

Q. Don't you know that it frequently happens that it costs sometimes dollar to get sixty-cents revenue on a branch road, and yet it will not pay the company to lop off the branch line?

A. That is often the case. I do not think that this is one of the cases.

Q. You do not know anything, of your own knowledge, of the expenses you have shown us?

A. Just the general expenses?

Q. I mean the particular expenses you have shown us.

A. Do I know whether they have occurred?

Q. Yes.

A. Of course, all these vouchers had to go through my hands for approval. Some expenses I am consulted about before they are made.

Q. As a matter of fact, all over the Wabash system the operating expenses of December and January were much larger than the previous winter?

A. No, sir; I think not.

Q. Did not the cold weather commence much earlier than usual, and did not your expenses increase?

A. My remembrance is that our expenses for January were less than last year.

Q. Is that true for December also?

A. I think they were about the same.

Q. Can you swear that the earnings of the St. Joseph Branch prior to the receivership did not exceed the expenses of operating the road?

199 A. Of course I cannot swear to it, and no one can.

By the MASTER:

Q. I think you stated that you were interested in some way with the lessee of this St. Joseph & St. Louis road at the time the lease was made?

A. Yes, sir.

Q. Do you remember why it was proposed to lease that road; why the transaction was entered into at that time?

A. Yes, sir. Mr. Hogue was then president of the road, and he was rather new at railroading, and especially unacquainted with matters out here in the West.

Q. President of what road?

A. The St. Louis, Kansas City & Northern road, and the owners of the St. Joseph road convinced him that if he did not lease that road a bridge would be built at Lexington and we would lose all the business from St. Joseph and the country west of St. Joseph, and that would go to the Missouri Pacific and we would lose a very valuable business. Fearing we would lose a very valuable business, he made the lease.

Q. Do you know whether there was any investigation made prior to the lease of the earning capacity of that road?

A. Prior to the lease it had been operated for a little while by the old North Missouri road, so that we had some acquaintance with the road; that was all the information we had. It was operated afterwards by a receiver. It was always operated in an indifferent manner. First, when the North Missouri took it, it was uncompleted and

not in a condition to show what it was really worth, and afterwards, when operated by a receiver, it was under such difficulties in a lack of funds that he did not think he was showing what it was worth. The value of the road was speculative entirely. They had no substantial figures in the past to guide any one in estimating its value.

200 Q. In estimating the expenses of doing the business over the St. Joseph road from St. Joseph to the junction has anything been charged this line for the use of the terminal facilities owned by the Wabash in St. Joseph?

A. They are not improved. They are simply vacant lots.

Q. This additional freight accommodation is on somebody else's property?

A. No; the land was bought with the idea of making a very much larger depot and yard than there is. From the fact the St. Joseph & Western did not enter into the arrangement they had expressed a willingness to enter into the property has not been improved. Maybe a few tracks have been laid on it.

Q. What is the property worth in St. Joseph independently of the use of it for this property?

A. I think it could be sold for all it cost or perhaps a little more.

Q. So that if the St. Joseph road were dropped from the system it would not be a loss to the Wabash?

A. No, sir.

By Mr. PRIEST:

Q. In the usual course of your business and your official relations the reports come to you?

A. Yes, sir.

W. S. LINCOLN, sworn for the receivers, testifies as follows:

Direct examination by Mr. PRIEST:

Q. You are chief engineer of the system of roads now operated by Messrs. Humphreys and Tutt as receivers?

A. Yes, sir; I am.

Q. How long have you occupied that position with reference to the previous management of this system of roads?

A. Three years and a half.

Q. Are you acquainted with the railroad of the St. Joseph & St. Louis Railroad Company running from north Lexington to St. Joseph?

A. Yes, sir.

Q. Have you recently made a trip over that road for the
201 purpose of investigating its condition?

A. I went over it on the 30th of March with a view of ascertaining its condition.

Q. Are you acquainted with the main line of the Wabash system from St. Louis to Kansas City or as far as R. and L. Junction?

A. Yes, sir; pretty well acquainted with it.

Q. Now, you may give your estimate of the expenditures that

would be required to put the line of the St. Joseph & St. Louis road in the same condition as that of the main line between the points designated.

A. Well, in looking over the line I made an estimate to show, in my judgment, what would be required to put the road in shape equal to what is called the main line of the Wabash. This estimate includes, however, the portion of the line between Lexington Junction and the river. The gross sum is $164,778.

Q. Now, after it was put in that condition by that expenditure what, in your opinion, would be the annual outlay in maintenance of the road?

A. $92,052.53 a year.

Q. How long have you been engaged practically as an engineer in the maintenance of railroads?

A. Well, continuously about twenty-four years.

Q. In charge of the maintenance as well as of the construction and operation of roads?

A. Yes, sir.

Cross-examination by Mr. CRANE:

Q. If this $164,778 was put on the road it would then be put in as good condition as the Wabash?

A. Yes, sir; I think so.

Q. What does it cost per mile to maintain the Wabash?

A. I do not know that I can give you the figures now.

Q. Can you approximate them?

A. I do not know that I can.

Q. You have charge of the road?

A. I have not; I never have had charge of the maintenance of the way.

Q. I thought you answered Mr. Priest that you had been
202 so occupied.

A. I should have said excepting the time I have been in St. Louis—for about two years. I have been twenty-four years continuously, with the exception of the past two years.

Q. Then you say $92,052.53 it would take thenceforward to maintain the road per annum?

A. That is for the entire length of the road—the entire length of the road from the river to St. Joseph.

Q. That is about $1,200 a mile per annum?

A. It is less than $1,200 a mile.

Q. Now, what would it cost to maintain the road henceforward in its present condition?

A. It is hard to tell. In its present condition there is considerable work to be done—considerable rails to be laid in the course of the next few years, and there is considerable ditching to be done.

Q. Can't you give an estimate of what would be the cost per annum of maintaining the road in its present condition?

A. Do you mean to keep it in its present condition?

Q. No.

A. Or to commence with its present condition?

Q. I understood Mr. Moore to say yesterday that there were eight and one-quarter miles of road that required immediate attention. Suppose the eight and one-quarter miles of road were laid with new rails or were put in as good condition as the rest of the road at present, then what would it cost to maintain the road in that condition?

A. I think it would be fully up to my estimate.

Q. Your estimate is $1,200 per mile?

A. Whatever it was. I have not figured it out per mile.

Q. What is the present condition of the iron on the road?

A. There are some portions of it very good and there is some that ought to be taken out at once—as soon as the new material could be sent there—and then there is some of the iron that would
203 probably last sixty days or ninety days longer without very much work, but then at the end of that time some more would have to be taken out. I think at least twenty miles of track would have to be relaid there this year by the first of next January.

Q. What is the character of the iron down there?

A. There are 27 miles of steel rail in the track—I expect about 25 miles—between Lexington Junction and St. Louis, and about 47 miles of iron rail, and that is in this condition, a portion of it being worn out and needing replacing at once, a certain other portion that could be used for ninety days, another portion for six months, and another portion running into next year, owing to the traffic.

Q. That needing replacement now and that needing replacement in ninety days—state what you mean more fully about that.

A. I say that that needing replacement at once is not in the condition that trains ought to be run over it very much. It is breaking very badly, and pieces breaking out of it, and it is scarcely prudent to retain the use of it.

Q. A large portion of the 25 miles of steel rail is old rail?

A. I do not know as to that. Some portion of it is old rail that has been used, as I understand—I am stating from what I learned by inquiries—on the main lines at various points and changed onto the St. Joseph Branch.

Q. Haven't you any information in your office where the rail was procured?

A. No, sir.

Q. Whose duty is it to know?

A. The superintendent of that division.

Q. Where does he live?

A. In Moberly.

By the MASTER:

Q. What was your information as to why this steel rail was taken out of the main line and put on the branch up there?

A. The traffic on the main line was so heavy it was thought
204 it would wear it out too rapidly on the main line, and it would wear many years on the branch, and they get better service out of it there.

Q. It was a good rail, but thought too light for the traffic on the main line?

A. Yes, sir.

By Mr. PRIEST:

Q. 52-pound rail?

A. Yes, sir; and 56.

By Mr. CRANE:

Q. Is not your information that it had been worn out considerably before it was taken out?

A. Yes, sir; the information I got was that some was in four years and some five years.

Q. Were you not informed that a large portion of it was cut at both ends before it was relaid?

A. I could not say.

Q. If that was done it was because it was worn out?

A. Worn out or broken off.

Q. They would not, because the rail was light in one place for one character of service and was then put to another service, before putting it down in another place, cut it off at the ends, not unless it was necessary?

A. Not unless it had failed or there was a necessity for it.

Q. You are familiar with most of the Western roads, are you not?

A. A great many of them or quite a number of them.

Q. There are a great many roads in successful operation in the western part of this State that have greater curves than this road?

Counsel for the receivers objects to the question as immaterial and irrelevant. Objection overruled.

A. Well, I do not know as to that. I am not well enough acquainted with them to be able to say that. I have been over portions of a great many of them. I will say that none of the roads have as much curvature proportionately as the St. Joseph Branch.

Q. Now, with respect to the grades, do you know about them?

A. We have nothing in the office that shows them. I can
205 say that in going over the road the grades seem to be pretty heavy.

Q. They are pretty heavy in the Western country going up from the bottom to the up lands?

A. Some have light grades and some are pretty heavy, owing to the location.

Q. How long a time did you spend going over this road?

A. I was one day on the road this time when I went up.

Q. You came back at night?

A. Yes, sir; I have been over the road a great many times. I have spent at different times two and three days along the road.

Q. Did you take the amount of traffic on the road into account when you were figuring as to the cost of maintaining the way?

A. No, sir; I did in a certain measure. Of course in maintaining the road I did not estimate that it would cost as much per mile

for keeping the track in order as on portions of the line where we have a heavy business.

Q. The more business the more expensive the keeping of the line in repair?

A. Yes, sir; in that particular I estimated what I thought would be about the proper basis for a branch line. As to the durability of the steel rails that were put on the branch line, I estimated in making the estimate that the maximum life would be twenty years with the traffic on the branch. I think it is liberal, but it is a pretty hard matter for a man to say the life of steel rails. It depends on the tonnage and speed of trains. You might say that good steel rails have scarcely been long enough in use in the country to determine that; that no sufficient data have been given.

Q. How many miles of track have been renewed since last year?

A. I cannot tell you.

Q. How is the condition of the road now as compared with three years ago?

A. It is better.

Q. Better than you have ever seen it?

A. I think it is.

206 Q. With the exception of these small stretches of track that you speak of, it would require practically no outlay of money beyond the ordinary cost of maintenance?

A. Yes, sir; it would. It would require the renewing of rails, as I mentioned, and then there ought to be considerable ditching done and widening out of embankments. There are some bridges and trestles to be rebuilt and considerable side-track work ought to be done, and some work to be done in the stock yards and some in the repairs of platforms, and a new water tank to be built at St. Joseph.

Q. If the road were put in excellent condition?

A. No, sir; in order to continue it in operation.

Q. These are necessary to be done?

A. They ought to be done as soon as they can be reached.

Q. The road has never been ditched in the manner you say it ought to be ditched?

A. I think in some places it has been done. Evidently the dirt has washed down and the grass has grown in the ditches, and, as nearly as I can tell, with the light force employed there, it has not been kept in the shape it ought to have been done.

Q. Is there anything inherent in the road—any circumstance attached to it—that would make it cost a greater outlay to maintain it in a given condition than any other road?

A. There are some miles that would require considerable work, more than certain miles of other roads that have been mentioned. Then the curvature—the average curvature—is more than a great many other sections of road that you could name in the country, and, in fact, a great deal more than the average on longer lines of road than that is. Then there are some places where embankments were built across quicksands—I do not know what you would

call them—side hills where they are apt to have slides to give them trouble.

Q. Where are they?

A. I cannot fix them in my mind. My attention has been
207 called to them several times in going over the road at several different points in company with the road-master.

Q. If those were new ballasted with proper ballast the difficulty would not be likely to occur?

A. Probably not. It would, perhaps, in extraordinary wet seasons.

Q. Do you know of any branch line or any main line in this part of the country whose operating expenses are $4,000 a mile?

A. I have no information in regard to that.

Q. If the operating expenses for six months were $130,000 that would be at the rate of about $4,000 a mile, would it not, for twelve months?

A. Yes, sir; but you must take into account, as I understand it, the operating expenses for the six months are for the time of year when the heavy renewal of iron and steel rails, the heavy surfacing and work on the track, has been done, and the probability is that that portion of the work for the next six months would be lighter.

Q. So in respect to building bridges?

A. Yes, sir.

Q. So that if four-fifths of the bridges and trestles have been rebuilt that would not occur?

A. Not, unless in a case of accident, for several years. You can qualify that a little. There is more or less expense in keeping up bridges, although they are entirely new. The main cost of rebuilding would not be incurred again for five or six years.

Q. I will ask you if you have any information or if, from the location of the road, you have any opinion as to the length of time steel rails you saw there which had been previously used had been worn before they were laid down there.

A. No, sir; I could not tell.

Q. Now, with the expense of operating the road and maintaining it at $130,000 for six months. Does that form any index to the normal expenses of operating the road for the ensuing twelve months?

A. That is pretty hard to say. If I were familiar with
208 just what had been done—just what comprised the operating expenses—I could answer intelligently, but I am not sufficiently familiar with it to be able to tell.

Q. You did not make any examination when there to see what had been done recently?

A. No, sir.

Q. What expenses had been occasioned by putting in new bridges, trestles, and culverts?

A. No; I saw that work had been done at various points, but did not examine it in detail. I also saw that work was in progress at other points.

Q. As the culverts were constructed in 1884, unless accident should occur, those culverts would last for years?

A. Wooden culverts would last five or six years, and stone culverts, unless accident occurred, would probably last twenty years.

Q. Those are extraordinary expenses, are they not?

A. You can scarcely consider it that, as it is an expenditure that is likely to occur on any road, and likely to occur from month to month and year to year.

Q. Those expenditures ought to be distributed over different years?

A. No, sir; I think the work ought to be done when it is required to be done.

Q. Is it right to charge the expense to one year?

A. I think it would be proper to charge it to one year if the work was done then.

Q. You heard Colonel How say they charged to each month the taxes for the year. Now, if a bridge was put up that cost $12,000 in one year that lasts twelve years, would it not be fairer to put $1,000 for one year than to put $12,000 for one year?

A. No, sir; because the next year you might have a wreck that would cost over $12,000, and the next year spend $100,000, and you would never get to the end of prorating.

Q. For this inquiry it would hardly be fair to say if the expenses of bridges cost $60,000—that is hardly a fair criterion
209 of what the bridge construction would be for the next six months?

A. That is owing to circumstances. If it was necessary to rebuild just so much bridge-work the next six months as the last six months you would have the same charge.

Q. If that comprehended four-fifths of the bridges on the line that could not possibly be true?

A. No; certainly not.

Q. Then it would not be a proper criterion of the expense of maintaining a road to base any estimate upon as large an expenditure as this for building bridges in six months?

A. If four-fifths of the bridges had been rebuilt in the first six months and charged up and there was only one-fifth remaining to make them all new, of course the expenditure in that particular branch of repairs would not be as much in the scond six months as in the first six months.

Q. Or for any other period of six months in five or six years to come?

A. No, sir; leaving out the question of accident.

Q. That is true of water tanks?

A. It is problematical altogether.

A. A. TALMAGE, sworn for the intervenor, testifies as follows:

Direct examination by Mr. PRIEST:

Q. At present you are engaged as general manager of the Wabash system of roads, of which Messrs. Humphreys and Tutt are receivers?

A. I am.

Q. And have occupied that position since their appointment?

A. Since the middle of last July.

Q. You are familiar with the line of railway from North Lexington to St. Joseph known as the St. Joseph and St. Louis road?

A. I am.

Q. How long have you been engaged in the management of roads?

A. I have been in the railroad service a little over thirty
210 years and have been in the management for about fifteen years; a little more, perhaps.

Q. How has the St. Joseph and St. Louis railroad been operated, since you had charge of it for the receivers, with respect to its capacity of earning freight and revenue?

A. We have endeavored to make the best arrangement we could of schedules that would give us the greatest amount of revenue over that line, and the traffic department of the road has used every exertion to get all the business we could get to and from St. Joseph over that line.

Q. In other words, you have managed it to its fullest capacity as you could judge?

A. Yes, sir.

Q. I will get you to give me your opinion as to the possibility of this earning a revenue beyond what it has already earned under your management.

Mr. CRANE: I think perhaps they have earned as much from it as they could earn. That fact is not traversed in any way.

By Mr. PRIEST:

Q. And state further whether it will ever be a paying road over and above its operating expenses.

A. I think it will be difficult to increase the earnings of that line very much. We have made every effort we could to secure business. We have had very fair crops the past season, which have given more business for the past three or four months than the line had for the corresponding period, I think, of the previous year. The road is not as economically a line to manage as many others, owing to its heavy grades, sharp curvature, and large amount of bridging to be maintained. On the line from St. Joseph to Kansas City, which is known as the St. Joseph and Council Bluffs line, an ordinary eight-wheel engine will handle from fifty to sixty cars between the two points, whereas a smaller engine will not handle
211 more than twelve to fourteen over this branch, which makes it much more expensive in operating. It is competitor of this line for business from St. Joseph to St. Louis, which connects at Kansas City with the Wabash, the Missouri Pacific, and Chicago and Alton. I would add still further that the country on the line of the St. Louis and St. Joseph between Lexington and St. Joseph is a stock-raising country, and not a grain-growing count-y to any great extent, and therefore the amount of local business that would be derived from that line is not near as great as it would be from a

country that raises a large corn crop. I would also state that there are two competitive lines that cross the St. Louis and St. Joseph, and that it is an easy matter to drive stock from one line to the other, whereas the corn crop is not easily moved any great distance from where it is raised without considerable expense.

Q. This makes the local business of the line less valuable than it would be in a country that raised more grain?

—. ——.

Q. What is the comparative value of such a section of country to a road with a section of country that raises corn and grain?

A. I cannot give the exact percentage, but it requires more acres to make a car-load of stock, a great deal, than it does a car-load of grain. The corn crop is the most profitable as to tonnage of any crop raised by the farmers. It requires less acreage to produce a car-load.

Q. What is the situation of the St. Joseph and St. Louis railroad as to competing with the Chicago, Burlington and Quincy and the Missouri Pacific for business to St. Joseph?

A. Its situation is this: The Chicago, Burlington and Quincy and also the Missouri Pacific have a great advantage over the St. Joseph and St. Louis line or the Wabash, both together, from the fact that each one of the companies owns lines in Nebraska and Kansas and a line running up the river from St. Joseph, over which they make reduced rates for the wholesale merchants of St. Louis in order
212 to give them facilities to compete with Atchison and other cities where there is a jobbing trade, and for doing this the wholesale merchants favor the Chicago, Burlington and Quincy and the Missouri Pacific in shipments to St. Joseph from New York and other Eastern points. They have a great advantage over the Wabash, as we control no line west of Missouri by which we can give them any special advantage on their shipments to allow them to meet their competitors.

Q. The jobbing trade of St. Joseph is chiefly done west of the Missouri river?

A. Almost entirely.

Q. Now, how is the Wabash over the St. Joseph and St. Louis line to St. Joseph situated with reference to the passenger traffic between St. Joseph and St. Louis as compared with these other roads?

A. We have the shortest line between here and St. Joseph by the St. Louis & St. Joseph road, but the line has never been a very popular one from that fact that away back in olden times it met with some serious accidents and was considered difficult to operate, and there is some feeling of distrust amongst the travelling public about using that, and a very large portion of the business from St. Joseph comes down by Kansas City and has for years and takes the St. Louis trains from there.

Q. Even before the Missouri Pacific had a line in?

A. Yes, sir; and since the Missouri Pacific run in. Of course they have run their train there—made that a terminus—and made it a continuous train from there. The Wabash have been running

a chair car through without change and are now running what is called a combination sleeper and chair car, which gives very good facilities, and we have been using the best endeavors we could to get all the passenger business over that line.

Q. I believe I have also asked your opinion as to whether the St. Joseph & St. Louis line would ever be a paying line.

213 A. It never can be a very profitable line. It will cost more to maintain than the other lines it competes with.

Q. I will hand you a paper here and ask where that paper was compiled and from what, if you know.

A. I think it came from my office, and that the figures were obtained from the auditor's office; a portion of them probably from the office of the division superintendent, where the details are kept.

Q. In the records of that office?

A. Yes, sir.

Q. And came to you in the usual course of business?

A. Yes, sir; as reports come in.

Counsel for receivers offers in evidence the paper referred to by the witness.

By Mr. CRANE:

Q. You did not make the report yourself?

A. No, sir.

Q. You never saw it until it was handed to you by counsel now?

A. Not until I came here.

Q. You do not know by whom the report was made?

A. Not positively.

Q. You only make a deduction from the fact that certain information of that character is lodged in certain offices?

A. Yes, sir.

Q. And from the paper being presented to you by counsel that it has been made in the offices?

A. Yes, sir.

Q. You know nothing of the truthfulness of the statements in there except you suppose them to be correct?

A. No, sir.

Counsel for the intervenor objects to the paper being admitted.

The WITNESS: I made the price of the rails there at $25.

Q. Had you seen them?

A. I saw them when they were being changed from the main line onto that line. I passed over both lines at the time the

214 changes were being made. That is what I called a fair price for the rails between two different properties trying to use the parties fairly. New steel rail would cost $30, and the line would be entitled to transportation from Detroit to this road. If you add that charge it makes a very fair charge. We sold our scrap iron at $20 and $18.50; so you see I only have charged from $5 to $6.50 more for steel rail than what was received for the iron rail.

Q. Have you given us credit here?

A. We credit each branch with all the rails we take from it. There does not seem to be an entry. The way we do it is this way: The total amount of steel rail is charged up, and we deduct that and charge only the difference between the two.

Q. There is no statement of that; there is no credit there?

A. There is a credit given. I ordered the superintendent to keep a strict account of each car of iron that comes from the branches, and the branches all get credit for it.

Mr. PRIEST: Here it is: "Statement of old iron taken out of track on St. Joseph and St. Louis R. R. during years 1883 and 1884.—Iron taken out during year 1883, 14 miles (track) old iron, 1,100 tons; iron taken out during year 1884, $9\frac{240}{320}$ miles (track) old iron, $723\frac{813}{2240}$ tons.

The most of the above iron could not be used again and was sold as mill iron, average price $20 per ton, f. o. b., Cleveland, Ohio, Indianapolis, and St. Louis; cost of handling, $1.50 per ton; bridge transfer charged 35 cents per ton. The iron not sold was used on side tracks on other districts and was no better than mill iron."

By the MASTER:

Q. Have you any doubt about the accuracy of the statements in that account?

A. I have not.

Q. It is a statement that in the performance of your duties
215 you would act upon without questioning?

A. Yes, sir.

Q. You have no personal knowledge of these details. Still you would rely upon it in the practical administration of the duties of your office?

A. I would take it to be correct. I never saw it. It has been prepared under the instructions from my office during my absence and made up by the division superintendent, who had the details of everything in his office, with the exception of some figures which perhaps he would get at the auditor's office. The only mistake there is in it is that the name of the maker of it and the office in which it is compiled is omitted.

The MASTER (to Mr. Crane:) Subject to your right of showing anything wrong about it, I will admit it.

The paper referred to was marked Exhibit H, and intervenor's solicitor excepted to the action of the master aforesaid.

By Mr. CRANE:

Q. With reference to that paper the statement is given of the number of miles of steel rail laid in 1883 and the number of miles of rails laid in 1884, and statements have been made here by other witnesses that there were steel rails on the road which before they could be laid had to be cut off at one end or both ends and fresh holes drilled in them to use on the St. Joseph Branch. Those steel rails would be worth so cut off how much a ton?

A. Just what is charged.

Q. $25?

A. Yes, sir.

Q. You say now that new steel rail would be worth how much a ton—$30 in St. Louis?

A. $30 delivered in Detroit was the contract we had.

Q. How much would that make it at Lexington?

A. Ou- rate from Kansas City to St. Louis on rails is $2.50 a ton, and from Detroit here—I do not remember just our tariff—the distance is 482 miles, and we ought to have a cent a ton a mile;
216 that would make $4.82. It would make the rate between $6 and $7 a ton.

Q. That would make it $36 or $37 a ton at Lexington?

A. Yes, sir.

Q. That is the price of new rails?

A. That is about the price. It varies a little.

Q. Rails worn out in the manner you have described would not be worth more than half the price of new rails?

A. They would. A steel rail breaks between the head and the bolt holes—where the bolts go through that hold the splices; breaks the upper half of the rail, and the balance of the rail is perfectly good. After you get back perhaps ten or twelve inches from the end of the rail the balance of the rail is good. There might have been some rails that had half of the head—from the neck, including the top of the rail, between the bolt and the top—gone. They cut both those ends off and drill another hole with a ratchet drill, which the trackmen have, and it is a good rail; not as good as a new rail, but good for a line that no more trains run on than on the branch.

Q. There is extra labor in it?

A. It consists in cutting it off, which is a very small matter. The quantity that would have to be cut is very limited.

Q. It requires time and labor to lay them down?

A. We usually take all the rails from one line clean, and if we find a rail broken in that way we cut the end of it off and put it in. It is done with the track labor—maintaining the track without any extra men.

Q. The expense is greater in laying that rail than in a new rail?

A. It costs a little more. You have spent a little more time on the rail than in tamping the ties or ditching.

Q. The expense of laying it is greater than laying a new rail?

A. Yes, sir; only it cuts so small a figure you could not tell what it amounted to in a year.

217 Q. How long have you been with the Wabash?

A. Since July 15th.

Q. When was the last time you were over the St. Joseph Branch?

A. I have been away from home four weeks now. It may be sixty days since I went over that line. I do not remember positively, but it is not long ago.

Q. You found it in better condition than it was some time ago?

A. It was in better condition than when I took charge of it?

Q. Is it not in better condition than it has been for many years?

A. That is a statement that has been made by men who saw the road when I took charge.

Q. What per mile will it cost per annum to keep it in the condition it is in now?

A. These statements will about cover it. You say the expenses for 1884 is little more than 1883. That comes in principally in the track labor. It is less for 1884—$71,543.75 for 1883 and $64,458.91 for 1884. There was a little more money spent on track labor in 1884 than in 1883.

Q. Taking into account the maintenance and other expenses, what ought the operating expenses of that road to be per annum?

A. I could hardly tell you; I have not figured on it. The cost of motive power is greater than on some other parts of the line from the fact that you can haul only a limited number of cars per train. You can haul from Lexington Junction to Brunswick with one engine nearly three times what you can haul over that line, and that makes the expenses of motive power heavier there, because you have to haul more trains.

Q. Can't you give us an approximate cost of running the road or operating the road per mile per year?

A. No; I cannot. I have not looked it up in that shape. This gives the cost of $71,543.75 in 1883 and $64,458.91 for 1884.

Q. That is about $1,000 a mile per year?

A. Yes, sir; nearly that.

218 Q. For other expenses would it be another $1,000?

A. Yes, sir; the maintenance of cars and engines and station expenses. There is one very important item that comes in there. You have a terminal station at St. Joseph which requires one or two switch-engines to do the work there and requires a considerable force of clerks and help at the station, more than ordinary stations do, and that adds to the cost.

Q. What altogether, taking what you have stated?

A. I make no statement. I will not make any guess-work statement.

Q. You have a chance to familiarize yourself with it?

A. I do not remember. Every branch is different and the main line, too.

Q. You have been familiar with this road for a good many years?

A. Not very familiar with it previous to my taking hold of it. I had been over it before taking charge of it.

Q. When connected with the Missouri Pacific?

A. Yes, sir.

Q. What estimate did you have of the value of the road to the system before you took charge of it?

A. I considered it gave them a short line into St. Joseph, but never considered the property a valuable one from the fact it was poorly constructed in the first place and expensive to maintain.

Q. If, however, the road had been put in good condition the cost of maintenance would be considerably less?

A. If laid with steel rail and bridges of iron and everything first class, as truck lines are, of course it could be maintained at a less cost per mile per annum than now.

Q. You do not know what was the cost of maintaining the road or operating it for the six months past?

A. No, sir. I do not.

Q. You spoke about the lack of popularity of this road as one of the reasons why it had not had as great an amount of traffic as it would naturally have, being the shortest competing line between St. Joseph and St. Louis. Is not that lack of popularity
219 more due to the manner in which the road had been maintained prior to the time the receivers took charge of it than to the memory of any accident that happened upon the line?

A. No, sir. I think not.

Q. Did not the road have, to your knowledge, a bad reputation for being a poorly kept concern, with insufficient passenger accommodations, bad track, bad road-bed, and dirty cars?

A. My recollection is that two years ago, or about that time, the Wabash management were running a through sleeper from St. Joseph to St. Louis, and I was informed by some of the officers of our line, who were feeling badly about the competition we had at St. Joseph, that they had fixed up the St. Joseph Branch and it was a strong competitor of the Missouri Pacific at that time.

Q. You are now, as you say, making extra exertions to build up the trade between here and St. Joseph by putting on a new sleeping car—a combination car?

A. I cannot say extra exertions. I am trying to do what I can do everywhere—making all the exertions I can to get business for the Wabash.

Q. You know the newspapers are filled with it?

A. There is a statement of something I have gotten up—that I wanted to get the Pullman Company to do for a line that would not fill a chair car or sleeping car full. I wanted to combine them in one car so as to give the passenger the benefit of a reclining chair and sleeping car and reduce the number of cars pulled in a train. The Missouri Pacific give a sleeping car and a chair car, and we combined the two in one on this road.

Q. Who owns the cars?

A. The Wabash road.

Q. They were built for that service?

A. Not built. We picked out two good coaches and made alterations in them and arranged with the Pullman Company to furnish the berths and run them, because they can run them better
220 than we can. I think we will get more money out of it than if we run them ourselves. We furnish the cars and they furnish the inside fittings, and we have no mileage to pay, the bedding, carpets, chairs, &c., and we furnish the naked car ready for the furniture.

Q. You hope in that way to build up a business?

A. I am in hopes to have more than we have had.

This was all the testimony introduced on the part of the receivers. By agreement of parties argument was heard April 10th, 1885.

EDMUND T. ALLEN,
Special Master.

UNITED STATES OF AMERICA,
Eastern District of Missouri, State of Missouri, City of St. Louis, } ss:

Be it remembered that on this 16th day of March, 1885, I, William Morgan, United States commissioner within and for the eastern district of Missouri and duly qualified under the laws of the United States to take depositions for use in the circuit courts of the United States, did call and cause to be and personally appear before me at the witness-room, in the Custom-House building, in the city of St. Louis, William F. Nisbet to testify and the truth to say on the part and behalf of The St. Joseph & St. Louis Railroad Company, intervenor in a certain suit or matter of controversy now depending and undetermined in the circuit court of the United States for the eastern district of Missouri, wherein The Wabash, St. Louis & Pacific Railway Company is complainant and The Central Trust
221 Company of New York *et al.* are defendants.

The said WILLIAM F. NISBET, having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, was examined, and he did thereupon depose, testify, and say as follows:

Direct examination by NEWTON CRANE, Esq.:

1 Int. You reside in New York?

A. I live at Yonkers, which is adjacent.

2 Int. What relation do you sustain to the St. Joseph & St. Louis Railway Company?

A. I am president of it.

3 Int. How long have you been president of the company?

A. About four years.

4 Int. You are also a director of the company?

A. Yes, sir.

5 Int. How long have you been such?

A. I should think I have been a director about ten years.

6 Int. When did you first see the road of the St. Joseph & St. Louis Railroad Company?

A. I was over it in the year 1874, the spring of 1874. I think in the month of March.

7 Int. In what capacity did you go over the road then?

A. I think I was one of a committee that was appointed to go over the road.

8 Int. By whom was that committee appointed?

A. Appointed by the board of directors, I think.

9 Int. When next did you go over the road?

A. In March, 1883.

10 Int. What was the condition of the road in March, 1883, as compared with its condition in 1874, or ten years ago?

A. In 1874 the track was in better condition than in 1883 in a great many respects.

11 Int. You mean by that that it was better prepared to do business?

222 A. Yes, sir; that the iron was not worn out and the track was in a great many respects in better condition.

12 Int. When next did you go over the road?

A. I went over the road in March, 1884.

13 Int. And then when next after did you go over the road?

A. In November, 1884.

14 Int. What was the condition of the track and of the road generally in November, 1884, as compared with the road and track in March, 1884?

A. It was in a good deal better condition in November.

15 Int. In what respect had it improved?

A. There was better iron there in many places. Portions of the road were very bad a year ago and that had been relaid and the bridges were in very much better condition, apparently; the ditches were better dug out and there was a very marked improvement that anybody would notice that went over it either in riding or looking at it.

16 Int. What did you notice in respect to the bridges in November, 1884?

A. I noticed most of the bridges on the line had new supports or piles put in, new head timbers in the trestle-works, and so on in many places.

17 Int. What new outlays had been made on the road that you particularly observed in November, 1884?

A. Well, there had been track put down or there had been other track to replace the old track—I would not say new track—and the bridges showed that a great deal of work had been done on them.

Q. In the nature of repairs or rebuilding?

A. I should say that some of them had been almost rebuilt. The new timbers showed they were new in looking at it. The ditches were dug out better than I had seen them on much of the road. The road had been very bad in that respect six months before. I noticed two or three tanks on the road which were new. One of them was yet unfinished; the tank itself was about finished,

223 but the machinery to connect it with the engine at that time was unfinished. That was near Plattsburg. I noticed that a little of the road had been ballasted up on the upper end, I think between Agency Ford and Matney, particularly that portion.

19 Int. Were the repairs that you saw made in the interval between March, 1884, and November, 1884, ordinary repairs put on the road or exceptional repairs?

A. Exceptional repairs—that is to say, they had never in the same time put anything like that amount of work on the road that I had ever seen, or improvements in the nature of permanent improvements.

20 Int. What were the repairs?

A. They were repairs as far as putting down of the track and cut-

ting out of the ditches and fixing the bridges. The tanks where they were renewed were not repaired. Much of the material—the hoops were old hoops, but the wood was new.

21 Int. I will ask you whether the improvements you saw made during the interval was such improvements or repairs as would annually be put upon the road.

A. To a certain extent, yes; and to a certain extent, no. I should judge that the amount of them was excessive; for instance, the tanks were built new, and a tank does not require to be built every year; it lasts a good many years. A portion of the track would last a good many years if properly laid, and the ditches would not need to be excavated perhaps to the same extent as they were last year, nor the bridges rebuilt. The bridges would not need any such amount of repairs for several years. A bridge once put in almost entirely new condition would last several years, and that work would not require to be done again for a long time.

22 Int. Had you observed in any similar interval during which you had visited the road any improvements of a corresponding nature?

224 A. No, sir; not to the same extent. I saw a year since that there had been some track put down in the fall and summer previous to that, between my two visits.

23 Int. You say that you were over the road as a director of the road about 1874?

A. I am not certain whether I was a director or a member of the committee of the stockholders appointed to go over the road.

24 Int. You went over the road in one or the other of those capacities?

A. Yes, sir.

25 Int. You observed the road and inspected it at that time?

A. Yes, sir.

26 Int. You were over the road again in the spring of 1883?

A. Yes, sir.

27 Int. And I understand you to say that the road was not in as good condition in 1883 as it was in 1874?

A. Yes, sir; it was not in as good condition.

28 Int. You are aware that there is a lease of the St. Joseph & St. Louis Railroad Company in existence to the St. Louis, Kansas City & Northern Railroad Company which has been assumed by the Wabash, St. Louis & Pacific Railroad Company?

A. Yes, sir.

29 Int. Was it prior or subsequent to the signing of that lease that you went over the road the first time you speak of?

A. I think it was just prior to it.

30 Int. Prior to the execution of the lease?

A. I think it was prior to the execution of the first lease; that was in 1874.

31 Int. The lease, I observe, was signed the first day of June, 1874; you do not know whether it was before or after that lease was signed?

A. I think it was before. If it was not before that it was the

spring of 1875. I think it was either the March before or the March after the lease was signed; I could not positively swear which it was, but I think March, 1874.

32 Int. You are familiar with the stipulations of that lease,
225 are you not, which is an exhibit in the suit brought by your road against the receivers of the Wabash Railroad Company?

A. Yes, sir.

33 Int. State from your observation whether or not the conditions and covenants of that lease have been kept which require the lessee of the road to keep it in good repair for the successful operation of business.

Counsel for the receivers objects to the question. Objection sustained.—E. T. A.

A. No, sir; the covenants of the lease have not been maintained in that respect.

34 Int. Has the road, to your knowledge, during that time been in a condition in which it could not be successfully operated?

Counsel for the receivers objects to the question.

A. It has been in a condition, I would say, where I think it could be put in a condition in which it could be much more successfully operated.

35 Int. What has been the difference in the condition of this road and the main line of the Wabash, St. Louis & Pacific?

A. The main line has been in a very much better condition.

36 Int. When were you last over the road?

A. I think on the 14th of March, 1885.

37 Int. Are you acquainted with the road-master of that road?

A. Yes, sir.

38 Int. What is his name?

A. His name is Gilbert Galvin.

39 Int. Had you a conversation with Mr. Galvin respecting the manner in which the road had been maintained?

A. Yes, sir.

40 Int. State what he said to you as to the bridges of the road.

Counsel for receivers objects to this as hearsay. Objection sustained.—E. T. Allen, sp. master.

A. Well, he said the bridges now were, as a general thing,
226 in very good condition.

41 Int. Did he state what had been done to the bridges recently; if so, what did he say?

Same objection. Same ruling.—E. T. A.

A. Yes; he said the bridges in the last summer had been built over; that about all of them had been piled anew; that new supports and new timbers had been put in and they generally been put in very good condition; that there was some of them that the winter caught them and they had not put on the cap pieces on them,

but most of them had the cap pieces on. There were some of the cap pieces there but not used yet.

42 Int. What did he say in respect to the water tanks?

Same objection. Same ruling.—E. T. A.

A. He said all the water tanks except the one at St. Joseph had been made new.

43 Int. Now, in respect to the laying of the rails on the road, what statement was made by him to you as to the character of the rails originally put on the road, the manner in which they were put down, and the maintenance of the rails?

Same objection. Same ruling.—E. T. A.

A. Well, he said there was some iron put down that came off the main line—some steel rails—and he said notwithstanding it was put down there it was not as good as the original old rail.

44 Int. For what reason was that?

Same objection. Same ruling.—E. T. A.

A. Well, it was his view, as the iron had been laid down and ran over on another road, when taken up it could not be made to bed itself firmly or well.

45 Int. Was this iron or steel?

A. Steel rail. I speak of it as iron.

46 Int. What was the condition of it when received by him?

Same objection. Same ruling.—E. T. A.

227 A. It was pretty well worn; perhaps there was some years of wear in it, and it was with great difficulty that it was laid and it cost a great deal to lay it.

47 Int. What was necessary to do with it?

Same objection. Same ruling.—E. T. A.

A. He had to cut it off in cases, to cut off the ends where they were worn more or less, and that would shorten the iron and make it less than thirty feet in length, and he had to straighten it as well as he could, and he had in many cases where there was a curve before to lay the rails straight, and he could not bend them and straighten them well. They were laid that way.

48. Int. As to the rails when cut off, what further labor was to be done to them?

Same objection. Same ruling.—E. T. A.

A. He said the ends after they were cut off the holes had to be punched again, adding additional cost of the rail and making the rail cost to lay it two or three times as much as it would cost to lay new rail.

49 Int. What proportion of rail that has been received for re-ironing that road was old rail and what was new?

Same objection. Same ruling.—E. T. A.

A. He said that the mass of the rail put down there was old rail.

50 Int. What use had it had elsewhere?

Same objection. Same ruling.—E. T. A.

A. It had been on the main line for a number of years. He thought seven or eight years' wear had been taken out of it from the looks of it.

51 Int. What experience has been had with the use of that rail with respect to its durability or its breaking?

Same objection. Same ruling.—E. T. A.

A. I recollect he said there was a breakage there in one day of twenty-three rails.

228 52 Int. What was the cause of that breakage?

Same objection. Same ruling.—E. T. A.

A. I understood that was iron that came from Rosedale, on the line. It was caused by the fact, as he explained, that the iron was unyielding, that it had been laid firmly and became set in its old position in the other track, and it was not easy to make such a rail conform to the new position; that it would snap if it was a hard rail—it was a steel rail—and that in cold weather it would more readily snap than if left where it originally was.

53 Int. State, if you know of your own knowledge or have acquired the knowledge from any statement made to you by any officer of the company, what would be the cost of maintaining the St. Joe Branch if the road were put in good order and fair condition.

Counsel for the receivers objects to the question unless it specifies that the agent who made the statement was acting in the course of his employment and had authority to bind, so far as admissions or statements, the complainant.

54 Int. State, if derived from another, who the other person was and under what circumstances you derived the information.

A. Mr. Galvin told me if the road had been properly repaired it would have cost very much less to keep it in repair. He said he thought it would be one of the easiest roads in the whole Wabash system to keep in order on account of the nature of the country and soil—a well-drained country, with a black, loamy soil, which he said was a very good soil for a road; that it made a solid bed.

55 Int. In what capacity was Mr. Galvin acting when you had the conversation with him?

A. He was acting as road-master.

56 Int. What was he doing at the particular time when you had the conversation with him?

A. Standing on the end of the train, going over the road to

229 examine it. I must state I think at the time he did not know who I was when he told me. He afterwards found out. I did not know at the time who I was talking with, but found he was posted in railroad matters.

57 Int. What statement did he make to you as to the character

of travel over that branch and the demand made for vehicles on the line for freight or other cars?

Counsel for the receivers objects to the question as calling for hearsay. Objection sustained.—E. T. Allen.

A. He said this winter there had been difficulty in getting rolling stock enough to do the business there. I think he said at one time they made a requisition for four hundred cars and got five cars. I think I understood him to say that. It was an extraordinary statement.

58 Int. What proportion of the track of this St. Joe Branch is fenced?

A. I should judge—I did not look at it this time as closely as I did last fall, when I noticed particularly and made notes of it—and I should think there was perhaps three-fourths of it.

59 Int. There *there* was one-fourth of it not fenced?

A. There might be about that. I cannot always tell by riding along in a train what it is, but I noticed between stations there was such a portion fenced and such a portion not fenced. I think I recollect he stated there was some three-fourths of it fenced. I know I made the statement last fall.

60 Int. You have made tours over the road for the purpose of reporting to your board; made them in the capacity as president of the board?

A. Yes, sir.

61 Int. State the character of the motive power and rolling stock on that road as compared with the main line.

A. It is inferior stock, very much inferior to anything else I have seen anywheres. The passenger cars are old rickety cars.
230 The chair cars are kept in better condition, but they are uninviting to passengers, and the engines are old engines as a general thing. I guess they are, all that I have seen.

62 Int. In other words, it is a sort of hospital for the main line?

A. Yes, sir; a kind of sanitarium for broken-down iron horses, it struck me. The cars that I saw there were not cars that people would take if they could find any other way of reaching the same point by better ones.

63 Int. Who is the agent of the company at St. Joseph?

A. A gentleman named Russell.

64 Int. Were any statements made to you in regard to the demands made there for transportation in reference to the facilities for carrying freight?

Counsel for the receivers objects to the question as calling for hearsay. Objection sustained.—E. T. A.

A. Mr. Russell told me the demand for cars had been greatly in excess of the number of cars to do the work.

65 Int. Do I infer from that that there were not sufficient cars to do the work?

Counsel for receivers objects to this as hearsay and immaterial. Objection sustained.—E. T. A.

A. There was not sufficient rolling stock to do the work of the road.

66 Int. Mr. Russell is still the agent of the company?

A. Yes, sir; and has been for two or three years or more than that.

67 Int. What statements were made to you, if any, by Mr. Russell as to the condition of the road as compared with its condition, say, in 1882 or 1883?

Same objection. Objection sustained.—E. T. A.

231 A. Mr. Russell said it seemed to be in a great deal better condition than it was in 1883.

68 Int. Was any statement made to you by him as to the nature of the improvements and the amount of money expended on the road in 1883 and 1884 as compared with the expenditures of previous years?

A. I think he said there had been a great deal more money spent in 1884 than there had been in the year before that.

69 Int. For what reason was that expenditure made?

Same objection. Objection sustained.—E. T. A.

A. For the reason that the road was in such bad condition that it had to be done. There was a great deal of damage arising from the bad condition of the road to the stock. I know he stated that they used to put on five springs a day on the engines on the road, on an average, and now they scarcely put any on in the last winter; that the road was so rough the engines would break the springs.

70 Int. What improvements, if any, have been made at the depot at St. Joseph during the past six months?

A. Since I was there last November there has been about fifty feet added onto the freight-house new, and the old has been fixed up some.

71 Int. And then with reference to the platform facilities.

A. The platform has been very much extended and enlarged. He said he had a derrick there to handle certain classes of freight that they cannot get unless they have the facilities to handle, but unfortunately the derrick was broken down and they could not handle it any longer.

72 Int. Was any statement made by Mr. Russell to you with respect to the necessity for enlargement of the freight depot; if so, what was it?

Same objection. Objection sustained.—E. T. A.

232 A. Yes, sir; Mr. Russell said the business was such that they must have more room, and now they could just about crowd business in; that it was crowded yet, but a great deal better than it was before he had it built; not so much inconvenienced.

73 Int. What statement was made by Mr. Russell as to the character of the business, as to the destination of the freight brought to the road at St. Joseph?

Same objection. Objection sustained.—E. T. A.

A. He spoke of the grain shipped from there—that it was all of it billed through to the Atlantic coast.

74 Int. By way of what distributing point?

Same objection. Objection sustained.—E. T. A.

A. I think he said Toledo and Detroit.

75 Int. In other words, it was billed over the entire line of the Wabash road?

A. I do not know that he said that. He said it was billed to the Atlantic coast and most always went over the Wabash system.

76 Int. What proportion of freight is now going that way and what is the proportion of the volume of freight going that way as compared with previous years?

Same objection. Objection sustained.—E. T. A.

A. He said that more had gone over it this year in that direction billed through the long trip than had gone over in ten years before.

77 Int. Do you mean to say in all the ten years previous?

Same objection. Objection sustained.—E. T. A.

A. Yes, sir; in all the ten years previous I understood him to say.

Cross-examination by Mr. PRIEST:

1 X Int. I suppose you are a practical railroad man—that you have had experience in managing, keeping, and in operating railroads?

A. No, sir; I have not. I cannot say that I have.

233 2 X Int. Have you ever had any experience in that regard?

A. I have not except on this road.

3 X Int. The extent of your experience on this road is that you have been its president for the past three or four years; that in 1874 you made a visit to this road, again in 1883, twice in 1884, and in March, 1885; that is the extent of your knowledge of this road and the extent of your experience in railroad affairs?

A. That is the extent of my experience on this road in going over it. It is not the extent of my experience in talking about it with railroad experts.

4 X Int. I want to find out your individual knowledge. Do you know what the duties of a road-master are?

A. Yes; I suppose I do to a certain extent.

5 X Int. What are they of your information?

A. I presume his duties are to go over the road, watch to see it is kept in order to the best of his ability, and keep it in repair.

6 X Int. Do you know what the duties of a road-master are?

A. No; I do not know; that is my impression.

7 X Int. You have no knowledge of what his duties are; you presume what his duties are?

By Mr. CRANE:

78 Int. You never were a road-master?
A. No, sir.

By Mr. PRIEST:

8 X Int. Never employed one?
A. No, sir.
9 X Int. Never superintended one?
A. No, sir.
10 X Int. While you are indulging in these presumptions what connection would you think the duties of a road-master would have with the machinery employed on the road, upon the coaches?
A. My impression is he would not have anything to do with them, but if he should see one tumble into the dit-h he could say so.
11 X Int. Do you know what the duties of an agent are?
A. I do not know as I do, yet I think I may.
234 12 X Int. Tell me, then, if you know the extent of your knowledge of the duties of an agent.
A. I think his duties are to take account of all freight received and distributed and to give rates, perhaps collect money, and make returns to the proper officer in regard to those things.
13 X Int. Now, would you think it was the business of a local agent to give rates over the entire line of road?
A. If he was authorized to do so by the system.
14 X Int. Would you think an agent would be authorized to do that kind of business?
A. I think so.
15 X Int. It is your idea that every agent of a station, it matters not how large or how small——
A. Not every station.
16 X Int. —is authorized to make rates over the entire road?
A. No; but I think the agent at St. Joe ought to have the privilege if you want to get business.
17 X Int. What duties would you give to a general freight agent? They have such an officer, generally?
A. Yes, sir.
18 X Int. What would you think his duties would be?
A. I should think he would be applied to if a lot of freight was offered and other roads were cutting. The station agent would be given cast-iron rules to live up to, but if freight was leaving him he would apply to the freight agent about it.
19 X Int. And his duties would be supervisory unless the exigency would arise?
A. No; he would be the superior.
20 X Int. He would be the superior without duties except in a case of emergency?
A. That does not follow. He, perhaps, would make the rate originally, and, perhaps, they did not hold good for every month, and order Mr. Russell next month to make rates at such and such a figure.

21 X Int. You think it is his duty to give rates to the agent, but not the duty of the agent to make the rates; he simply gives the public the rates given?

235 A. I do not know about that; it depends on the latitude given him.

22 X Int. Under the system devised here would it not be his duty?

A. I should think it would be the duty of the agent to live up to the instructions given him by the head.

23 X Int. What connection would the station agent have with the motive power of the road or control or authority to be exercised in that regard?

A. I presume if an engine was smashed up on the St. Joe road it would be reported to Mr. Russell, and Mr. Russell would, perhaps, report to headquarters down here; perhaps that would be his duty; I do not know.

24 X Int. Do you think he would have charge of the motive power?

A. No, sir.

25 X Int. Why would you leave him with control of the motive power rather than the agent at R. and L. Junction?

A. It is possible that might be the case. I do not know about it. I may be perfectly mistaken. I am not a railroad man. Without knowing I should say that in case of a bad break that Mr. Russell would be applied to and inform the parties here.

26 X Int. On what facts do you base such an assumption as that, and why would you prefer Mr. Russell to any other agent along the line of the road?

A. Because Mr. Russell seems to be the head man, the agent at the larger places having the larger business on the line.

27 X Int. And that is the reason?

A. And that is the reason.

28 X Int. You think he would keep an account of the number of springs broken under an engine, and you think because he is the station agent he would keep account of the number of miles of road repaired, the iron furnished, and the comparative expenditures on the road for the different years? Do you think those would be his duties because he had the largest station?

A. That does not follow, that he should keep any record at all.

29 X Int. How many bridges did you notice on the road in 1874?

236 A. I could not tell you.

30 X Int. How many bridges along the line of the road?

A. I have never counted them, but I have heard there was one hundred and twenty-eight; I think I have been told that.

31 X Int. I ask you of your personal information. You have testified as to making different trips over it in the several years.

A. Yes, sir.

32 X Int. Now, I want your personal observation and knowledge. Have you any knowledge of the number of bridges along the line of the road?

A. What they call bridges, if you include everything that is called a bridge on the road. They call every little crossing, every little trestle-work, a bridge, and number them as bridges, and there are upwards of one hundred of them; but as bridges in the true sense of the word than span streams of any magnitude there are not over half a dozen.

33 X Int. Where are they?

A. There is one crosses the river just this side of Plattsburg; I think two that cross the Castine—I think that is the name of the stream—close together; one that crosses the Platte, and there are one or two others that I could not locate just now, between what towns they are. I could locate them, but I have not the papers to do it.

34 X Int. What is the character of the bridge at Plattsburg?

A. It is a long bridge.

35 X Int. How long?

A. I have never measured it. I should think it was a bridge two hundred feet across.

36 X Int. Wood or iron?

A. Wood.

37 X Int. When was it built?

A. Last summer; the most of it.

38 X Int. When was the first bridge built there?

A. I could not tell you.

39 X Int. What is the character of it?

A. Wood.

237 Counsel for intervenor objects to this examination as entirely immaterial, the witness not pretending to know the details of the road. Objection overruled.—E. T. Allen, sp. master.

40 X Int. How much repairing do you think ought to be done on that road annually to keep it up?

A. Well, sufficient to keep it up.

41 X Int. How much would be sufficient to keep it up—what amount of expenditure would be required on that road in the way of repairs to keep it up?

A. If the road was put in good order, or do you mean as it is now?

42 X Int. To have it as it was when the lease was made.

A. That would be a difficult problem. There would be a large expenditure to put it in that condition, and it would not require much to keep it in good order.

43 X Int. How much in the condition it was when it was leased to the St. Louis, Kansas City & Northern Railway Company?

Counsel for intervenor objects to the question because the lease provides that certain repairs should be made to the road under the stipulation as to the rent of the road, and that after those repairs were made, then the rental should be a different sum, the intention of the framers of the lease, as expressed in the lease, being that the repairs should be made permanent at the beginning.

44 X Int. Take it in the condition the main line of the Wabash

Railroad Company is now, what amount of annual repairs would be necessary to keep it in that condition?

Counsel for intervenor objects to the question on the ground that the witness is not an expert, nor has he given any expert testimony, nor what would be considered as an opinion of what would be necessary, but simply given a statement of what he has observed. Objection overruled.

238 A. I am not prepared to answer that question, because I have never figured it over.

45 X Int. Are you prepared to say that there had been more repairs made on the road in 1884 than were necessary?

A. Not a bit. I am prepared to say that there have not been as much as ought to have been made on it.

46 X Int. Wherein would you say more ought to have been made?

A. Wherein would I suggest?

47 X Int. Yes.

A. I should say the entire road between Lexington Junction and the river should be relaid with new iron or new steel, and that such sleepers as are there which are unfit for use should be replaced by new ones and the ditches should be dug out. I should suggest, furthermore, that there are some miles more of the old iron put down in 1868 or 1869 that should be taken out and a better class of iron put in.

48 X Int. Is it not a fact that those ditches alongside of the road fill up every winter and it is necessary to clean them out in the summer—that that work is annual work?

A. Not in every case is that the case, in my opinion.

49 X Int. Name me some case where it is not the case in your experience in railroading?

A. The ditches are not properly made, oftentimes. They are made and the dirt thrown towards either side, and annually fills up quicker than if taken away. They have been ditching with a machine for that purpose—it is not hard work—and it throws the material on both sides, and hence it washes back and fills up.

50 X Int. On all roads does not the dirt wash down every year and have to be cleaned out each spring?

A. Yes, sir; but if thoroughly ditched there would not be anything like the amount of trouble in that respect there is now.

51 X Int. How would you thoroughly ditch it—wall it up?

239 A. No; do it as they do it on other lines—as they dig out the ditches on any lines. You will find the ditches are dug out very differently from ours. I have found the earth almost level with the top of the rail in some cases, and there is no need of it.

52 X Int. How does that interfere with the management and operation of the road?

A. It may not interfere with the immediate management, but it rots the ties, very materially adds to the expense of maintaining

that road, because it is not thoroughly and well done; just as if you had water on your cellar floor it would rot the floor out quickly.

53 X Int. Did you ever see any ties or rails submerged in water on account of the lack of ditches?

A. Yes, sir.

54 X Int. Where?

A. Just this side of Richmond. There is quite a long place where the dirt is up level with the top of the rail, and where in some cases the wheel strikes the earth when it strikes the rail.

55 X Int. I asked you about water.

A. There was water there.

56 X Int. Standing over the ties or rails?

A. Standing over the ties. I have seen it very frequently. Every time I have been over I have noticed the ditches as being badly taken care of.

57 X Int. You say in November, 1884, you found them cleaned out and in better condition than in March?

A. Yes, sir; very much changed in that respect, but not all, by any means.

58 X Int. If the tanks and bridges were put up at the same time they would be necessarily renewed at the same time at a corresponding period subsequently?

A. I suppose, if two tanks were put up at the same time, as a general thing they would rot out about the same time.

59 X Int. And so with the bridges?

240 A. I think very likely it would be so with the bridges.

60 X Int. Do you know how long Mr. Galvin has been employed on that road, on that branch?

A. I am under the impression that Mr. Galvin came there this winter—along in the fall.

61 X Int. He has been there perhaps six months.

A. Perhaps six months, perhaps eight. I hardly recollect what he did tell me about that, but I am under that impression.

62 X Int. That road is very crooked, is it not?

A. It is very straight in some places and crooked in others, like most roads in this country.

63 X Int. Is it not very crooked in its route, making frequently short bends to follow ravines?

A. It is straighter than some roads I have ridden upon and more crooked than others. I do not think it is as crooked as the Hudson River railroad or the Erie, or is more so than the Chicago & Alton right out here. I am very certain there are many roads more crooked than that.

64 X Int. How often did you go over the road in 1884?

A. Twice.

65 X Int. In March and November?

A. Yes, sir.

66 X Int. Did you go in both directions?

A. I did in November; I did not last March.

67 X Int. More than once?

A. No, sir.

68 X Int. On a passenger train on each occasion?

A. I went over on a passenger train at one time, in a baggage train another time. I have been in different trains and sometimes gotten off and frequently taken another one afterwards.

69 X Int. In 1874, how often did you go over it?

A. I went over it once.

70 X —. In which direction?

A. Both, I think.

71 X Int. In 1883, how often?

A. I went over it in 1883 once, in the spring.

72 X Int. In both directions?

241 A. I do not recollect, in 1883, whether I went both. I am under the impression I only went one; but I would not swear to that.

73 X Int. On a passenger train?

A. I think part of the time on a freight train and a passenger train. I think I took a freight train and stopped at every stop an hour on that day and examined the road.

Redirect examination by Mr. CRANE:

79 Int. You say you went over the road in 1883 the first time after you were elected president of the road?

A. Yes, sir.

80 Int. What statement did you make to the lessee, through any of its officers, after that trip by way of remonstrance against the condition of the road, if you made any such statement?

A. I went to Mr. Hopkins, in New York, and he was away when I first went to see him.

81 Int. State who Mr. Hopkins was.

A. He was vice-president of the road and I went to see him, and he told me some months after I got back. I found him and he told me he had been over the road. I think it was October or November I went to see him, and he said he had just come from St. Louis and that region and had been over the road, and he said, "We have been working on the road since you were there and they put a great deal on it since you were there, put on one thousand tons of rails, rails that were taken up that were too light for the traffic on the main line on the old North Missouri, and were putting it down there." He said they would put it in good order; that was their intention; that they would commence last year and go to work at it till they got it in good order. He admitted it was not in good order, by any means.

82 Int. Did they put it in good order?

A. No. They have not got it in good order yet.

83 Int. What conversation had you with Solon Humphreys, a receiver of the Wabash line, with respect to the operation of

242 the road, by way of remonstrance, if you made any such remonstrance, as to the management of the road and its bad condition?

A. I spoke to Mr. Humphreys about it last summer, and he said

they were doing a good deal, and the intention was to put it in good order; that they were spending a good deal of money on it.

84 Int. Did he state whether or not it was an exceptional sum they were spending on it?

A. No; I do not think he said it was exceptional. I do not know as he said anything about that. He said they were at work on it and putting it in good condition.

85 Int. What was said by him with respect to the abandonment of a part of the track from Lexington to North Lexington?

A. That was more recently. I was written to by a party on the line of it, and I went to see Mr. Humphreys. That was early in December since I was out here. They only abandoned that recently, in December, I think, and he said to me that Mr. Talmage was in the city then; that I had better see him, or, rather, he would see him, and I went back in a few days, and he and Mr. Talmage had come to St. Louis. Mr. Humphreys said he had not heard of it when I went to see him before he and Mr. Talmage had come to St. Louis, and I wrote him a letter about it, and have never heard from him about it.

86 Int. Do you know whether trains are running over that portion of the road?

A. I am told they are not.

87 Int. You said the first conversation that you had with Mr. Humphreys was in the summer. You mean the summer of 1884?

A. Yes; it is possible in September; sometime in the fall.

88 Int. The conversation was held here or in New York?

A. No; it was in New York.

89 Int. At the time you had the conversation with Mr. Humphreys, in the summer, the matter of that road was talked over between you, was it not?

A. Yes, sir; it was talked over. One of the directors went with me at the time.

243 90 Int. Mr. Humphreys expressed himself as being familiar with the line of the road?

A. Well, I do not know as I could say that exactly, that he expressed himself that way. He spoke of working at the road and putting it in good order, and so on. We went to see him at the time more especially about another matter—about the rent—and this came up casually.

91 Int. He knew the terminal points of the road?

A. Yes, sir; there is no question about that.

Signature waived.

UNITED STATES OF AMERICA,
Eastern District of Missouri, } ss:

I, William Morgan, a United States commissioner within and for the eastern district of Missouri, and being duly qualified under the laws of the United States to take depositions for use in the circuit

courts of the United States, do hereby certify that on the 16th day of March, 1885, I was attended at the witness-room in the Custom-House building, in the city of St. Louis, in the said eastern district of Missouri, by Newton Crane, Esq., solicitor for the intervenor, and H. S. Priest, Esq., solicitor for the receivers, and the witness, Wil-F. Nisbet, who was of sound mind and lawful age, and who was by me carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and his deposition was reduced to writing in short-hand in the presence of the witness and from his statements.

I further certify that it was then and there agreed, in my presence, by said counsel that the transcript of said short-hand notes so taken might be read in evidence in said cause without the signature of said deponent with the same force and effect, to all intents and purposes, as if said transcript had been subscribed by said deponent in my presence.

244 I further certify that the foregoing was furnished me as a true and faithful transcript of said short-hand notes so taken.

I further certify that I am not of counsel or attorney for either of the said parties in said deposition or caption named or in any way interested in said cause named in said caption.

In testimony whereof I have hereunto set my hand and seal this 24th day of March, 1885.

WM. MORGAN,
Commissioner U. S. Circuit Court, Eastern District of Missouri.

Stipulation as to Taking of Deposition of —— Gouldy.

CENTRAL TRUST CO. OF NEW YORK *et als.*
vs.
WABASH, ST. LOUIS & PACIFIC R'WAY CO. } Consolidated.

In United States Circuit Court, Eastern District of Missouri.

In the matter of intervening petition of St. Joseph & St. Louis Railroad Company.

It is hereby stipulated and agreed by the respective parties hereto that the deposition of —— Gouldy may be taken by and in behalf of said intervenor, at the office of said intervenor, at number 66 New street, in the city of New York, county and State of New York, on Thursday, the 2d day of April, A. D. 1885, between the hours of 8 o'clock in the forenoon and six o'clock in the afternoon of said day, and that said deposition may be taken before any officer authorized under the acts of Congress to take depositions, and that such deposition, when taken, may be read in evidence on the hearing

245 before the master to whom said intervening petition has been referred, with leave to either party to make such objection to

the competency, relevancy, and materiality of the testimony as might be made were the witness examined orally before the master.

PATTISON & CRANE,
Att'ys for St. Joe & St. Louis R. R. Co.
CENTRAL TRUST CO. OF N. Y. &
JAS. CHENEY,
By BUTLER, STILLMAN & HUBBARD AND
PHILLIPS & STEWART.
H. S. PRIEST, *Sol'r for Receivers.*

WABASH, ST. LOUIS & PACIFIC RAILWAY CO.,
By HENRY T. KENT, *Att'y.*

Deposition of witness produced, sworn, and examined on the second day of April, in the year of our Lord 1885, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, at the office of the St. Joseph and St. Louis Railroad Company, No. 66 New street, in the city, county, and State of New York, before me, Charles H. Higgins, a notary public in and for the county and State aforesaid, in a certain cause now depending in the circuit court of the United States for the eastern district of Missouri, in the matter of the intervening petition of the St. Joseph and St. Louis Railroad Company in the case of The Central Trust Company of New York *et als. vs.* The Wabash, St. Louis and Pacific Railway Company (consolidated) *et al.*, on the part of the intervenor.

NATHANIEL E. GOULDY, being duly sworn, on his oath says that he is a resident of the city of New York, State and county of New York; that he is now in the lumber business. For about nine years
246 I was the secretary and treasurer of the St. Joseph and St. Louis Railway Company and had charge of its finances and affairs. This was during the time between 1874 and 1884, about. I went over the road in 1874 soon after I was elected secretary of the company, just before the road was leased to the St. Louis, Kansas City and Northern Railway Company. I also went over the road and examined its condition as well as I was able about nine months after the lease was signed. The road at that time, with the exception of the cross-ties, was in a fairly good condition. I was the secretary of the road when the lease was signed and I signed the lease as the secretary of the lessor. The lease provided that only ten thousand dollars a year should be paid as rent for the first two years, and thirty-five thousand dollars a year for the next ensuing three years, and thereafter thirty per cent. of the gross earnings of the road to the end of the term, provided that in no year the rental should be less than twenty-five thousand dollars. This agreement was made upon the understanding and promise of the lessee that the small rental to be paid during the first five years should be on account of the improvements and betterments to be put by the lessee upon the road, it being agreed that a large sum of money was needed to put the road in a condition to be successfully operated according to the terms of the lease. I passed over the road

frequently after the lease was signed and at no time at a longer interval than two years and observed closely the condition of the road. I noted that whatever betterments were made were in the nature of patchwork and that no thorough repairs as was agreed upon were made. After each trip over the road I spoke to some one of the general officers of the road and remonstrated with them upon the bad condition of the road. I spoke generally to Mr. How about it and he always made some excuse and said the road, the lessee, was just about to begin the work of putting the road in good or-
247 der. I also spoke to President Mitchell and to President Lewis, and each of these gentlemen said the same thing Mr. How said. When I went over the road the last time, in 1882, I found that in grading and with respect to the ties it was considerably better than when the lease was made, but with respect to the rails it was infinitely worse, except for about fifteen miles, where heavier rails had been laid. I saw Mr. How there, and also Mr. Hopkins, the vice-president, and they both said that they intended to put the road in good condition right off. With respect to the lease of the road, I desire to state that in the winter of 1873 and 1874, at a meeting of the first-mortgage bondholders of the St. Louis and St. Joseph Railway Company, held at the office of Thesses, Jemeson, Smith and Cotting, in New York city, Mr. Solon Humphreys presented a proposal to lease the road to the North Missouri Railroad Company, of which at that time he was a director and in whose interests he appeared at the meeting. The proposition was declined. About in 1881 I had a conversation with Mr. Humphreys about the St. Joseph and St. Louis Railway Company, and, in response to my remark that our road was of great value to the Wabash system, he said "No," and that he knew all about our road and had been familiar with it from it- origin. After this I had a conversation with Mr. Jay Gould in the office of the Wabash Railway Company, at the corner of Dey street and Broadway, in New York. Mr. Gould was at that time the president of the Wabash Railway Company. He told me that our road was worth one million dollars to him, and he would give that sum for it if I would give him back five hundred thousand dollars. Prior to this time I had had a conversation with Mr. James F. How at the Wabash office, in St. Louis, and I then proposed to him that I would arrange to have our company release the Wabash road from the lease if the Wa-
bash — would give up the lease. He flatly refused to en-
248 tertain the proposition. I had no authority from our board or stockholders to make such a proposition, but I made it in order to ascertain what estimate the Wabash Company put upon the value to it of this lease. Mr. How was an officer of the Wabash Company, its secretary, and it was with him that as secretary of our company I had my dealings. While going over the road in my official capacity I had frequent complaints made to me of the lack of facilities furnished to shippers, and these I reported to Mr. How. The corporate name of what is now the St. Joseph and St. Louis Railroad Company was formerly the St. Louis and St. Joseph Railroad Company. After the latter company had been sold out by the

first-mortgage bondholders it was reorganized under the former and its present title.

NATHANIEL E. GOULDY.

Subscribed and sworn to before me on the day, at the place, and within the hours first aforesaid.

[SEAL.] CHARLES H. HIGGINS,
Notary Public, Kings County.

Certificate filed in New York.

I, as aforesaid notary public, do certify that in pursuance of the annexed notice came before me at the office of the St. Joseph and St. Louis Railroad Company, No. 66 New street, in the city of New York, the aforesaid Nathaniel E. Gouldy, who was by me sworn to testify the whole truth of his knowledge touching the matter in controversy aforesaid; that he was examined, and that his examination was reduced to writing in my presence and subscribed and sworn to before me on the day, between the hours, and at the place in that behalf first aforesaid, and that his deposition is now returned herewith; and I further certify that the said Nathaniel E. Gouldy is a resident of the city of New York aforesaid.

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Given at New York, in the county and State of New York, this second day of April, 1885.

[SEAL.] CHARLES H. HIGGINS,
Notary Public, Kings County.

Certificate filed in New York.

STATE OF NEW YORK, }
County of Kings, } *ss.:*

I, Rodney Thursby, clerk of the county of Kings and clerk of the supreme court of the State of New York in and for said county (said court being a court of record), do hereby certify that Charles H. Higgins, before whom the annexed deposition was taken, was at the time of taking the same a notary public of the State of New York in and for the said county, dwelling in said county, commissioned and sworn, and duly authorized to administer oaths for general purposes; and, further, that I am well acquainted with the handwriting of such notary and verily believe the signature to said deposition is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said county and court this 9th day of April, 1885.

[SEAL.] RODNEY THURSBY, *Clerk.*

250 EXHIBIT A, J. F. A.

Earnings of the St. Joseph & St. Louis R. R. Dec. 1st, 1883, to Sept. 30th, 1884.

Months.	Freight.	Passengers.	Mails.	Express.	Miscell.	Total.
1883.						
December	9,833 17	3,335 52	455 45	157 50	153 50	13,935 14
1884.						
January	9,931 76	2,160 49	455 45	157 50	157 83	12,863 03
February	13,468 96	2,340 77	455 45	157 50	100 87	16,523 55
March	15,406 66	2,744 30	455 45	157 50	96 52	18,860 43
April	10,295 52	2,647 41	333 56	157 50	81 72	13,515 71
May 1st to 28th	7,453 54	2,490 66	411 38	142 26	69 80	10,567 64
June—May 29th to June 30th.	9,886 53	2,736 83	499 53	250 00	106 39	13,479 28
July	6,792 12	2,905 28	455 45	250 00	130 27	10,533 12
August	9,754 83	3,580 65	455 45	250 00	83 81	14,124 74
September	10,806 42	4,483 19	455 45	250 00	92 18	16,087 24
Totals	103,629 51	29,425 10	4,432 62	1,929 76	1,072 89	140,489 88

EXHIBIT B, J. F. A.

A. O. 400. Solon Humphreys, Thomas E. Tutt, receivers.

D. B. Howard, auditor; Morris Trumbull, ass't auditor.

WABASH, ST. LOUIS & PACIFIC RAILWAY,
AUDITOR'S OFFICE, ST. LOUIS, *March* 18, 1885.

Messrs. Pattison & Crane.

DEAR SIRS: The estimated gross earnings for Dec., 1883, and Jan. & Feb., 1884, upon which the rent for 6 mon. ending March 1st, was paid, are as follows:

Dec., 1883	$13,000 00
Jan., 1884	10,000 00
Feb., 1884	10,000 00
	$33,000 00

The actual gross earnings for the same period were as follows:

Dec., 1883	$13,935 14
Jan., 1884	12,863 03
Feb., "	16,523 55
	$43,321 72

Very truly, D. B. HOWARD, *Aud.*

251 EXHIBIT C, J. F. A.

Post office, St. Joseph, Mo.

OFFICE OF THE POSTMASTER, *Dec.* 31*st*, 1882.

To the hon. the railroad comm'rs, Jefferson City, Mo.:

GENTS. I take the liberty to address to you this letter informing you of the fearfully bad condition of the St. Joseph Mo. Branch of the Wabash, St. Louis & Pacific R. R. The Iron is in a most lamentable worn condition in fact a great deal of it is completely worn out that is the face of it. The ties is many of them rotten and Entirely unfit for use as is the Road Bed worn & washed & in bad repair. I wright you this letter because I am on the Road much of my time. I am U. S. Mail Agent consequently I am forced to take my chances of life & limb & Just go it or resign & the some other man would bee exposed as I am. all of wich I submit to you for your consideration & I hope your immediate action.

I am most Respectfully Yours, J. N. THOMAS,
Mail Agent.. Lex. & St. Joe St. Joseph, Mo.

I hereby certify that the foregoing is a correct copy of a letter of the date therein specified and received at the office of the railroad commissioners of the State of Missouri Jan'y 2nd, 1883.

Witness my hand and seal of the office this 26th day of January, 1885.

[SEAL.] H. H. GREGG, *Secretary.*

252 EXHIBIT D, J. F. A.

Report of Inspection of St. Joseph Division of Wabash, St. Louis & Pacific R'y, St. Joseph to Lexington Junction.

MAY 4, 5, 6, & 7, 1883.

Fencing.—Very little of the line is fenced, and a considerable amount of stock is killed monthly in consequence of this neglect.

Road-bed.—A large amount of ditching is necessary, and should be done during the present season. The embankments are generally of fair width, although any material removed from cuts, when work of ditching is in progress, can be advantageously used in widening banks. But a small proportion of line is ballasted. The character of the doil however is such that a good track can be maintained without stone or gravel ballast.

Highway crossings are not as required by law, although they are in about the average condition of such crossings throughout the State.

Cattle-guards are generally in good order, and those of recent construction are of most excellent design and workmanship. Several cattle-guards need entire renewal, and others more or less repairs.

Masonry.—There is but little masonry on line, there being none in way of bridge abutments or piers except at Plattsburg. A num-

ber of box culverts have been washed out and pile trestles built in their stead. The following special culverts were noted as being liable to wash out on occasion of sudden and heavy rain. Box culvert about 100 f't from E. end of trestle 94. Box culvert under 12 f't bank — east of above mentioned, and box drain (wooden) in bank about 1¾ miles E. of Lathrop. No warning boards or signs are provided at road crossings. (See sec. 807 chap. 21 art. 2 Rev. Statutes of Mo. 1879.) Pier in Platte river at agency is of timber crib-work, and is now being enlarged and strengthened.

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Trestles.—With but few exceptions—trestles on line are in good order—a large proportion of them being new as to caps, stringers and ties, and several with new piling. None are in a condition, which could be considered unsafe so far as strength of material is concerned. All trestles, in my judgment, should be provided with sufficient guard-rails. A considerable amount of new material was noticed at different points on line for repairs needed.

The piling in many of the trestles will no doubt need renewing in course of two years. In some instances the ties or trestles need replacing. Some few new stringers are needed. A small proportion of the trestles have framed bents—and none of the sills of these bents are under ground.

Some few of the pile trestles are rather high for their width—and notwithstanding the heavy lateral bracing with which they are provided, show quite violent vibration under passing trains. I would recommend the substitution of a truss bridge for high trestle No. 105.

Bridges.—The truss bridges on this line are all wooden Howe trusses, and were new in 1876–7. None were covered and deteriorated rapidly for that reason. No. 110 is a new bridge (deck) having replaced a high trestle. No. 98 should be repaired soon. No. 96 Platte river (two spans) is to be rebuilt at once, a large amount of new material for that purpose being already delivered. No. 81 needs repairs and west approach needs new stringers.

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Plattsburg bridge needs extensive repairs, and it is probable should be renewed entirely. Has timber bent under 3d panel from W. end of truss, and unless repairs are to be made soon, it would be well to put two more bents under bridge. Countrebrace in 4th panel from E. end. North truss should be renewed at once. Many timbers in chords and also many braces show decay to a considerable extent. The E. approach (high trestle) is in fair order. Piling will need attention in course of another year.

Material is delivered for renewal of bridge No. 68. All bridges are very strong in tension members especially Nos. 81 and 68 which are unusually so.

Track.—Some fifteen miles of track are in as bad condition as can be and allow traffic to be maintained. The condition of tracks in St. Joseph yards and for 1½ miles east is as bad as can well be imagined. The light iron (48 lbs. p yard) originally laid on line with chair joints, is absolutely worn out, and it is impossible to keep the rails in anything like line or surface. Track has been patched until it is all patch, and nothing short of renewal can improve it. There

is in different portions of the track, a large amount of old iron taken from main line, and which was well worn when taken up. This track is better than that where the old light rail with chair joints *are* used, but is still too badly worn to make good track. Altogether there are about 36 miles of track which is good or can be made so by lifting, lineing and surfacing, and with the proper proportion of new ties. There are some sections of most excellent track on line. Between Tanner and Plattsburg especially (within 2½ miles of Tanner) is some track which cannot be excelled by any track put upon similar material. It is perfect in line and surface—well
255 drained—has good proportion of new ties put in and the foreman on the section certainly deserves credit for the excellence of his work.

On an average I estimate that 700 ties per mile should be provided. Some portions of the track and fully 75% new ties. Section men should lift track on portions of line where rails and fastenings are good, and surface it, as another season's traffic without this work will seriously damage the rails. This work is especially needed on those portions of line where track has been put on rock ballast.

The force employed on track is entirely too small to expect much work to be accomplished in way of keeping it in proper order, the section gangs numbering from 2 to 3 men, and sections 6 to 7 miles in length.

In my judgment the best policy for the management of this line to pursue would be to place it in good condition as soon as is possible and I consider that it would be true economy to do so. With the worn-out track renewed, the road-bed thoroughly ditched—the proper proportion of new ties put in, the line fenced, and section gangs increased to at least one man per mile of track, the cost of maintenance would soon be greatly reduced, the operation of the road rendered much easier and its patronage correspondingly increased. Passing as it does through a rich, productive and well settled portion of the State, and having a terminus at one of its principal commercial centres there should seem to be every reason why it should be placed and kept in first-class condition.

The buidings at St. Joseph are in very poor condition. The buildings along line are generally good. Some stations being provided with very neat and commodi-us houses. The water supply is
256 ample for a large traffic. The line is rather a difficult one to keep in good condition on account of the excessive amount of curvature, and particularly of reversed curves.

The trains so far as my notice extended, (I was on line four days) are carefully run—the rate of speed over the worn-out portion of track being necessarily slow.

In my opinion new rails and fastenings, sufficient to relay thirty (30) miles of track should be provided for this line, as soon as possible, and also an average of 700 ties pr. mile. A work train with a strong force of men should be employed in ditching through this season. The old iron now in track will, in my judgment, furnish good rail enough to lay five miles of track which can be put in good condition.

My judgment is that the only way to place this line in a proper condition is to do the necessary work as quickly as possible and to allow no more patching.

With the material provided as recommended and track renewed, a work train put on and section force increased I think four months' work will suffice to place this line in good order, after which it can easily be kept so.

JAMES HARDING,
R. R. Commissioner.

Jefferson City, May 11th, 1883.

I hereby certify that the foregoing is a correct copy of the report of inspection St. Joseph Division Wabash, St. Louis & Pacific R'y, filed in this office May 9th, 1883.

Witness my hand and the seal of the office this 26th day of January, 1885.

[SEAL.] H. H. GREGG, *Secretary.*

257 EXHIBIT E, J. F. A.

Wabash, St. Louis & Pacific Railway Co., general superintendent's office.

ST. LOUIS, Mo., *May 21st*, 1883.

Mr. H. H. Gregg, sec'y State of Missouri R. R. com'rs, city of Jefferson, Mo.

DEAR SIR: Your letters of May 11th, enclosing a copy of the report of Com'r Harding, also yours of May 19th, both of which were addressed to Mr. How, have been referred to and received by me.

Please be kind enough hereafter to address all communications regarding the track, bridges, etc., of this railway to me.

We have it in contemplation to make considerable renewals upon our St. Joe Branch this year, in the way of putting in a great many new ties and also a considerable amount of new rails. We propose to keep that division in safe shape to run trains over. The business there will not warrant us to go to such a great expense as indicated in the report of Mr. Harding, but we propose to make a great many renewals and keep the track on that division as well as other structures in safe shape for the passage of trains.

Respectfully, ROBT. ANDREWS, *Gen'l Sup't.*

I hereby certify that the foregoing is a correct copy of a letter of the date therein specified and received at the office of the railroad commissioners of the State of Missouri May 22nd, 1883.

Witness my hand and the seal of the office this 26th day of January, 1885.

[SEAL.] H. H. GREGG, *Secretary.*

257½ EXHIBIT F, J. F. A.

Wabash, St. Louis & Pacific Railway Co., auditor's office.

ST. LOUIS, *April 2nd*, 1884.

H. H. Gregg, Esq., sec'y board railroad commissioners, Jefferson City, Mo.

DEAR SIR: I have yours of 31st ult. and in compliance with your request I have prepared a statement showing the estimated amount of earnings, &c., on the several roads operated in Missouri. The earnings per train mile on each I am not able to give, having no method by which I can now form even an estimate.

I trust the enclosed statements showing earnings and expenses of lines in Missouri will be satisfactory.

Yours truly,

(Signed) D. B. HOWARD, *Auditor.*

I hereby certify that the foregoing is a true and correct copy of a letter received in this office on the 3rd day of April, 1885, and that the papers appended are true and correct copies of the statements enclosed in said letter.

Witness my hand and the seal of the office, at the city of Jefferson, Mo., this 21st day of March, 1885.

H. H. GREGG,
Secretary Railroad Commissioners.

Earnings of Main and Branch Lines in Missouri, Stating Each Line Separately.

Approximated.

	Per mile of road.	Per pass. train mile.	Per freight-train mile.	Per tr'n mile, all trains.	Total.
North Lexington to St. Joseph	$2,210 00	.....	.....	.....	$168,402 85
West Quincy to Trenton	1,146 62	.....	.....	.....	193,846 99
Alexandria to Dean	3,309 89	.....	.....	.....	233,347 49
Other roads in Missouri	6,593 26	.....	.....	.....	4,296,862 73
Totals	5,247 17	$1 00	$1 27	$1 18	4,892,460 06

258 *Expenses of Main Line and Branches in Missouri, Stating Each Line Separately.*

Approximate.

	Per mile of road.	Per pass. train mile.	Per freight-train mile.	Per tr'n mile, all trains.	Per cent. of earnings.	Total.
North Lexington to St. Joseph	$1,432 80				64 8/10	$109,178 10
West Quincy to Trenton	1,279 61				88 1/10	171,438 52
Alexandria to Dean	3,372 21				101 2/10	237,740 95
Other roads in Missouri	4,102 29				62 2/10	2,673,465 31
	3,423 23	$0 70	$1 05	$0 93	65 2/10	3,191,822 88

Statement of Renewals, Repairs, etc. (by Road Department), on St. Joseph and St. Louis R. R. During Year 1883.

*7 miles track, 52-lb steel rails, 572 tons, @ $25.00		$14,300 00
7 " " 60-lb new iron, 660 " " $30.00		19,800 00
5 1/8 " fence (board), new, @ $280.00 per mile		1,435 00
Repairing fences and gates		350 00
Cross-ties, 23,900 ties, @ 40c.		9,560 00
Switches, frogs, etc., renewals & repairs		440 00
Track spikes, 200 kegs, @ $4.70		940 00
" bolts, 100 " " 5.20	1,560	520 00
Nut locks, 500, @ 20.00		100 00
		47,445 00
Road dep't pay-rolls for St. Joe and St. Louis R. R., 1883		24,098 75
		71,543 75

Statement of Renewals, Repairs, etc. (by Road Dep't), on St. Joseph and St. Louis R. R. During Year 1884.

†9 33/52 40/280 miles track, 52 and 54 lb steel rail, = 759.106 tons, @ $25.00	18,976 18
11.3565 miles fence (wire), @ 173.25 per mile	2,022 72
Material furnished for fences for ¾ mile	110 00
Repairs and renewals, fences and gates	400 00
Crossing plank for road crossings	48 00
Rock ballast, 160 cubic yards, @ $1.00	160 00

*The 7 miles (track) steel was taken out of main line on dist's 26 and 27, and was very little worn, and was really worth more than $25.00 for a large portion of it; consider this only a fair price.

† The above steel was taken out of main line on 26 and 27 dist's, and was not much worn; fully worth $25.00 per ton.

Cross-ties, 23,548 ties, @ 40c.		9,419 20
Track spikes, 180 kegs, @ $4.70		846 00
" bolts, 90 " " 5.20	1,414	468 00
Nut locks, 5,000 " " 20.00		100 00
Switches, frogs, etc., new, renewals & *renewals*		660 00
		33,210 10
Road dep't pay-rolls for St. Joe & St. Louis R. R., 1884		31,248 81
		64,458 91

259 *Statement of Old Iron Taken Out of Track on St. Joseph and St. Louis R. R. During Years* 1883 *and* 1884.

Iron taken out during year 1883.

14 miles (track) old iron = 1,100 tons.

Iron taken out during year 1884.

$9\frac{224}{280}$ miles (track) old iron, $723\frac{813}{280}$ tons.

The most of the above iron could not be used again, and was sold as mill iron; average price, $20.00 per ton, F. O. B., Cleveland, Ohio, Indianapolis, and St. Louis; cost of handling, $1.50 per ton; bridge transfer charges, 35c. per ton. The iron not sold was used on side tracks on other districts and was no better than mill iron.

EXHIBIT H, J. F. A.

Statement of Renewals, Repairs, etc., by Bridge and Building Dep't on St. Joseph and St. Louis R. R. During Year 1884, *from April to December, Inclusive.*

Bridges and trestles, renewals	$15,322 89
Bridges and trestles, repairs	19,055 00
Stations, platforms, and stock-pens, repairs	1,957 98
Water stations, renewals	1,560 00
Water stations, repairs	1,707 08
Road crossings and fences, renewals & repairs	355 47
Section-houses, " "	670 53
Culverts, " "	763 45
Engine-house, repairs	60 68
	$41,453 08

The office of the B. & B. dep't was burned and all the records destroyed in month March, 1884; therefore cannot give statement prior to that date.

260 In the Circuit Court of the United States for the Eastern District of Missouri.

THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants, *vs.* WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.*, Defendants.	In Chancery. No. 2357, No. 2464 (Consolidated).
ST. JOSEPH & ST. LOUIS RAILROAD COMPANY, Intervenor.	Master's No., 50; Clerk's No., 591.

Record of Proceedings Before the Master.

This supplemental petition, which was filed on June 1st, 1885, was first called for hearing on June 20th, 1885, at which time Messrs. Priest and Grover appeared for the receivers, the intervenor not appearing, and the hearing was adjourned until 11 a. m., August 3rd, 1885.

Pursuant to adjournment, as above stated, on August 3rd, 1885, Messrs. Priest and Grover appeared for the receivers, the intervenor not appearing, and the hearing was adjourned until 11 a. m., August 10th, 1885.

Pursuant to adjournment, as above stated, on August 10th, 1885, the receivers appeared by George S. Grover, Esq., the intervenor not appearing, and the hearing was adjourned until 11 a. m., August 17th, 1885.

Pursuant to adjournment, as above stated, on August 17th, 1885, the receivers appeared by George S. Grover, Esq., the intervenor not appearing, and the hearing was adjourned until 11 a. m., August 31st, 1885.

Pursuant to adjournment, as above stated, on August 31st, 1885, the receivers appeared by Messrs. Priest and Grover, the
261 intervenor not appearing, and the hearing was adjourned until 11 a. m., September 7th, 1885.

Pursuant to adjournment, as above stated, on September 7th, 1885, the receivers appeared by George S. Grover, Esq., the intervenor not appearing, and the hearing was adjourned until 11 a. m., September 14th, 1885.

Pursuant to adjournment, as above stated, on September 14th, 1885, the intervenor appeared by E. W. Pattison, Esq., and the receivers by George S. Grover, Esq., and the hearing was adjourned until 11 a. m., September 18th, 1885.

Pursuant to adjournment, as above stated, on September 18th, 1885, the intervenor appeared by E. W. Pattison, Esq., and the receivers by Messrs. Priest and Grover, and the following proceedings were had:

Counsel for the intervenor called the attention of the master to the following stipulation:

THE CENTRAL TRUST COMPANY OF NEW YORK *et al.* *vs.* THE WABASH, ST. LOUIS & PACIFC RAILWAY COMPANY *et als.* } Consolidated Cause.

In the matter of the intervening petition of the St. Joseph and St. Louis Railroad Company.

Whereas at the time when the intervening petition of the St. Joseph and St. Louis Railroad Company was filed rent had accrued under the lease therein set out only to the first day of September, 1884; and whereas since the filing of said intervening petition another six months' installment of rent has accrued, to wit, for the six months ending March 1st, 1885; and whereas all the evidence taken at the hearing before the master under the inter-
262 vening petition now on file will apply and is pertinent to the application for payment of the last mentioned six months' rental:

Now, therefore, it is stipulated by and between the parties interested that the said intervenor may file a supplemental petition asking for the payment of the rent for the six months ending March 1st, 1885, and that the evidence already taken shall be considered as applicable to and introduced in support of said second intervening petition, with the privilege to said intervenor of introducing such further testimony, if any, as it may desire, and that the report of the master shall cover both said petitions, and the further proceedings therein shall apply to both petitions as though only one petition had been filed embracing the entire year's rent.

St. Louis, May 26th, 1885.

PATTISON & CRANE,
Sol'rs for St. Joseph & St. Louis R. R. Co.
H. S. PRIEST,
Solc. for Receivers, Solon Humphreys & Thomas E. Tutt.
PHILLIPS & STEWART,
For Central Trust Co. of N. Y.
HENRY T. KENT,
Of Counsel for Wabash, St. Louis & Pacific R'y.

J. F. How, recalled for the intervenor, testifies as follows:

Direct examination by Mr. PATTISON:

Q. Will you look at the figures as given in the supplemental petition showing the gross earnings of the St. Joseph & St. Louis Railroad from the 1st of September, 1884, to the 1st of March, 1885, and state if they are correct?

A. Yes, sir.

263 Q. The amount of the gross earnings is what?

A. $95,244.57.

Q. Thirty per cent. of that is $28,572.37?

A. Yes, sir.

Q. In your previous examination you stated that the gross earnings which the rest of the system realized from business originating on that branch was a certain sum. That sum, as you stated it, was $100,434.37. That was a statement from the date of the appointment of the receivers, on the 29th of May, up to the 1st of January, 1885. I would like to ask you now if you can give the figures for each month from the 29th of May, 1884, up to the 1st of March, 1885?

A. Yes, sir.

Q. Give them.

A. From May 29th to June 30th, 1884, $18,698.87. Those are the earnings derived by the rest of the system from business originating on the St. Joe line.

Q. Gross or net?

A. Gross. For July, $9,122.92; for August, $11,140.68; for September, $12,983.44; for October, $14,323.95; for November, $13,637.93; for December, $20,526.58; for January, 1885, $21,726.13; for February, $11,447.98.

Q. Where do you get those figures from, from the auditor's office?

A. Yes, sir.

Q. Can you explain how the auditor arrived at that?

A. After allowing the St. Joe line its proportion on any shipments originating on that line, the balance of it is allotted to the main line as its proportion of the business originating on that line.

Q. For illustration, what at any time, for instance, would be the average rate from St. Joseph to St. Louis on car-load shipments?

A. It varies according to the shipments, according to what it is.

Q. Take a car-load of grain.

A. Take a car-load the rate on which would be $40 from St. Joseph to St. Louis, the St. Joseph road would be allowed $\frac{72}{306}$ths of that as its proportion of that $40, and the balance would be the
264 benefit the main line derived from that shipment.

Q. This includes the benefit to the main line from shipments originating on the St. Joseph & St. Louis road. Do you credit the St. Joseph & St. Louis road with any amount on freight originating on other portions of the line destined for St. Joseph?

A. No, sir; this includes the business originating on that line or passing over that line from points west of it. Any business destined to that line or points west we assume we would have to deliver to that line or some other line and they are entitled to claim that they contributed it to us.

Q. Is it not a fact that by having that connection at Lexington Junction for St. Joseph that the main line could make more on goods destined for St. Joseph or some other point on that line than it could if it had to deliver them to some other carrier at Kansas City or the junction?

A. No; I think out of the business for St. Joseph we would get more if we delivered it at Harlem. The business destined beyond St. Joseph we would get more.

Q. Would not the rate be the same from St. Louis to St. Joseph, whether it went by way of our line or by way of Harlem?

A. The allowance of the main line would be larger; the rate might be the same, but we would have a longer haul.

Q. How far is it from Kansas City or Harlem to St. Joseph?

A. Forty miles.

Q. Would you be able to get as much freight if you had to send it by that route as other lines that could take it by a direct route?

A. I think so.

Q. It is your opinion, then, if a car-load was to be sent from Toledo to St. Joseph that you would be as likely to get it if you had to take it to Kansas City and give it to a connecting carrier as if you took it through on your own line?

A. I think we might make an arrangement by which we would get as much business.

265 Q. Will you state if this pamphlet which is entitled "Basis for distributing the operating expenses to the branches and lines of the Wabash, St. Louis & Pacific railway" contains the basis on which the charges were made to our lines for expenditure, as testified before when you were on the stand?

A. Yes, sir.

Q. Does the St. Joseph & St. Louis railroad have to stand the extra expenses of the stations on its line?

A. Yes, sir.

Q. That includes the union depot at St. Joseph and the expenses there?

A. Yes, sir.

Counsel for the intervenor offers in evidence the book referred to and the same is marked Exhibit 100.

Cross-examination by Mr. PRIEST:

Q. By whom and upon what advice were the rules promulgated which are contained in the book which has been offered in evidence purporting to contain the rules for distributing the operating expenses of the branches and lines of the Wabash, St. Louis & Pacific railway?

A. The rules making the allotment of earnings in most cases were adopted under the advice of John C. Gault and Joseph Tucker, though in the St. Joe case the lease covers that and the operating expenses. It was decided on after consultation with the general manager and the superintendent and myself.

Q. Those gentlemen, upon whose advice and consultation with whom the rules were adopted, were they men of experience in railroad matters and understanding the proper mode of distributing the expenses?

A. I think so. They were all men of experience, fifteen years or more.

Q. Were the rules decided to operate justly and equitably between the branches and main line?

A. Yes, sir; our opinion was, after drawing up the rules, that if there was any injustice that it worked a hardship to the main

266 line and gave a preference to the branches.

Q. The estimate of benefit from business derived from the St. Louis & St. Joseph road is the gross sum?

A. Yes, sir.

By the MASTER:

Q. You have stated this morning the gross earnings of the St. Joseph & St. Louis railroad for the months that were named by you. I wish you would state now the expenses for those months of operating the road.

A. Commencing September 1st and ending February 28th, the operating expenses were $137,310.22, a little over $42,000 more than the earnings.

Q. State whether there was any month in the six months when the operating expenses were less than the gross earnings.

A. No, sir.

Q. Now, have the operating expenses which you have just given been determined in accordance with the rules laid down in the exhibit filed here this morning?

A. Yes, sir.

At this point the further hearing of the case was adjourned until 11 a. m., September 19th, 1885.

Pursuant to adjournment, as above stated, on September 19th, 1885, the intervenor appeared by E. W. Pattison, Esq., the Central Trust Company of New York by J. W. Phillips, Esq., and the receivers by H. S. Priest, Esq., and the intervenor offered in evidence the two papers referred to by the witness, J. F. How, in his evidence given yesterday in this case, no objection being made thereto, and the same were marked respectively Exhibits 101 and 102, and the case was submitted.

267 EXHIBIT 100, J. F. A.

Basis for Distributing the Operating Expenses to the Branches and Lines of the Wabash, St. Louis & Pacific Railway.

Wabash, St. Louis & Pacific railway.

Solon Humphreys and Thos. E. Tutt, receivers.

Basis for Distributing the Operating Expenses to the Main Line and Branches.

Conducting transportation.

Advertising.

All general advertising should be charged to the through lines only, being prorated upon the basis of the earnings of said lines.

All but the following roads will be considered as through lines:

Havana, Rantoul & Eastern.

Champaign, Havana & Western.
Peoria, Pekin & Jacksonville.
Springfield & Northwestern.
St. Louis, Jerseyville & Springfield.
Quincy, Missouri & Pacific.
Columbia Branch.
Centerville, Moravia & Albia R. R.
Des Moines & St. Louis R. R.
Des Moines Northwestern R. R.
Clarinda Branch.
St. Louis, Ottumwa & Cedar Rapids R. R.

Local advertising should be charged to the line for which the expense is incurred.

Agents, salaries and expenses of soliciting and traveling ag'ts.

To be charged to the through lines only in the same manner as for advertising.

Agents, station.

At points common to two or more branches the division of expenses will be on the following basis:

Butler	D., B. & St. L. R. R.	50 per cent.
	Eel River R. R.	50 per cent.
268 Denver	I., P. & C. R. R.	50 per cent.
	Eel River R. R.	50 per cent.
Peru	I., P. & C. R. R.	35 per cent.
	Main Line east	65 per cent.
Logansport, west side	All Eel River —.	
Logansport	All Main Line east.	
Danville	Charge Cairo Line salary of check clerk and one laborer.	
Tilton Junction	Main Line east	88 per cent.
	Cairo Division	12 per cent.
West Lebanon	Main Line east	60 per cent.
	H., R. & E. R. R.	40 per cent.
Champaign	All C., H. & W. R. R.	
Strawn	Chicago & Strawn R. R.	50 per cent.
	" & Paducah R. R.	50 per cent.
Forrest	Chicago & Strawn R. R.	65 per cent.
	T., P. & W. R. R.	35 per cent.
Fairbury	Chicago & Paducah R. R.	20 per cent.
	T., P. & W. R. R.	80 per cent.
Howard	Chicago & Paducah R. R.	50 per cent.
	H., R. & E. R. R.	50 per cent.
Lodge	C., H. & W. R. R.	25 per cent.
	Chicago & Paducah R. R.	75 per cent.
Monticello	C., H. & W. R. R.	25 per cent.
	Chicago & Paducah R. R.	75 per cent.
Bement	Main Line east	50 per cent.
	Chicago & Paducah R. R.	50 per cent.
Decatur	Main Line east	50 per cent.
	Decatur & E. St. L. R. R.	45 per cent.
	Champaign, H. & W. R. R.	5 per cent.

Peoria	T., P. & W. R. R.	80 per cent.
	P., P. & J. R. R.	20 per cent.
Hollis	T., P. & W. R. R.	75 per cent.
	P., P. & J. R. R.	25 per cent.
Havana	C., H. & W. R. R.	30 per cent.
	P., P. & J. R. R.	40 per cent.
	S. & N. W. R. R.	30 per cent.
Springfield	S. & N. W. R. R.	5 per cent.
	Main Line east	95 per cent.
Bates	Main Line east	75 per cent.
	St. L., J. & Sp'f'd R. R.	25 per cent.
Jacksonville	Main Line east	75 per cent.
	P., P. & J. R. R.	25 per cent.
269 Elvaston	Main Line east	25 per cent.
	T., P. & W. R. R.	75 per cent.
Bluffs	Main Line east	50 per cent.
	Hannibal & Naples R. R.	50 per cent.
Maysville	All Hannibal & Naples R. R.	
Keokuk	T., P. & W. R. R.	50 per cent.
	M., I. & N. R. R.	50 per cent.
Glenwood Junct.	M., I. & N. R. R.	50 per cent.
	Main Line west	50 per cent.
Coatesville	Main Line west	50 per cent.
	St. L., Ott. & C. R. R. R.	50 per cent.
Kirksville	Main Line west	50 per cent.
	Q., M. & P. R. R.	50 per cent.
Centralia	Main Line west	75 per cent.
	Columbia Branch	25 per cent.
Des Moines	St. Louis, Des Moines & Northern R. R.	Wheelage pro.
	The remainder to—	
	Des Moines & St. L. R. R.	Two-thirds.
	" N. W. R. R.	One-third.
Albia	Des Moines & St. L. R. R.	50 per cent.
	C., M. & A. R. R.	50 per cent.
Centerville and Relay	C., M. & A. R. R.	25 per cent.
	M., I. & N. R. R.	75 per cent.
Brunswick	Main Line west	50 per cent.
	Bruns. & Chillicothe R. R.	50 per cent.
Chillicothe	Bruns. & Chillicothe R. R.	50 per cent.
	St. L., C., B. & O. R. R.	50 per cent.
Pattonsburg	St. L., C., B. & O. R. R.	50 per cent.
	C., B. & St. L. R. R.	50 per cent.
Roseberry	C., B. & St. L. R. R.	75 per cent.
	Clarinda Branch	25 per cent.
Lexington Junction	Main Line west	75 per cent.
	St. Joe & St. L. R. R.	25 per cent.

Baggage-master, wages of baggagemen on trains.

Charge to the lines upon which the train runs. If the train runs over two or more branches, prorate upon passenger-train mileage.

Brakemen and porters, passenger.

Distribute upon the same basis as baggage-masters.

Brakemen, freight.

Charge to the lines upon which the train runs. If the train runs over two or more branches, prorate upon freight-train mileage.

270 Cars, cleaning, oiling, and inspecting, passenger.

Charge the total expense to all of the lines upon the basis of mileage of passenger cars.

Cars, cleaning, oiling, and inspecting, freight.

Charge the total expense to all of the lines upon the basis of mileage of freight cars.

Cars, fuel for.

Distribute upon the same basis as cars, cleaning, oiling, and inspecting.

Cars, hire of, passenger.

Charge to the lines upon which the service is performed.

Cars, hire of, freight. (Use of foreign cars balance.)

Distribute to all of the lines (narrow gauge excepted) upon the basis of freight earnings.

Cars, light for.

Distribute upon the same basis as cars, cleaning, oiling, and inspecting.

Cars, oil, tallow, waste, &c., for.

Distribute upon the same basis as cars, cleaning, oiling, and inspecting.

Clerks.

Clerks at stations to be charged to the line where the service is performed, and at stations common to two or more branches the division of expenses will be upon the same basis as for station agents; clerks in general offices to be distributed to all of the lines upon the basis of earnings.

Commissions.

To be charged to the lines according to the route of the tickets upon which commissions were paid.

Conductors.

Charge to the line upon which the train runs. If the train runs over two or more branches prorated upon train mileage.

Damage to property,
" " stock,
Injuries to individuals,
Loss and damage to baggage,
" " " freight,
Mail expenses,

} Charge to the line incurring the expense.

Incidentals.

Such expenses as can be located to be charged to the line incurring the expense; expenses common to the entire line to be prorated upon the basis of earnings.

Printing and stationery.

Stationery for agents to be charged to the lines upon which the expense is located. For agents at stations common to two or more branches the division of expenses will be upon the same basis as for station agents. Printing and stationery in common for the entire line to be distributed upon the basis of earnings.

271 Stations, expenses of.
" fuel at.
Stations, labor at.
" light at.
" repairs of and rent.

} Charge to the line upon which the expense is located, and for expenses at stations common to two or more branches the division of expenses will be upon the same basis as for station agents.

Superintendence.

General expenses common to all of the lines to be distributed upon the basis of earnings; division superintendents, assistants and clerks, train-masters, etc., to be charged to the lines in the division upon a train-mileage basis.

Telegraph, expenses of.

General expenses, common to all of the line, to be distributed upon the basis of earnings; operators at stations to be charged to the line where the service is performed, and at stations common to two or more branches the division of expenses will be upon the same basis as for station agents; train dispatchers and supplies to be charged to the lines in the division upon a train-mileage basis.

Union depots, expenses of.

Charge to the line upon which the expense is located.

Yardmen and switchtenders.

To be charged to the line where the service is performed, and at stations common to two or more branches the division of expenses will be upon the same basis as for station agents.

Dining-car expenses.

To be charged to the lines for which the service is performed.

Motive Power.

Enginemen and firemen, passenger.

Charge to the lines upon which the service is performed. If the run is over two or more branches distribute the expense upon an engine-mileage basis.

Enginemen and firemen, freight.

Charge to the lines upon which the service is performed. If the run is over two or more branches distribute the expense upon an engine-mileage basis.

Engine-house and machine-shops, light and fuel for.
" " " repairs of.
Charge the total expenses to all of the lines upon an engine-mileage basis.

Incidentals.
If the expense is local to any one of the lines charge same to the line for which the expense is incurred. If common to all of the lines distribute upon an engine-mileage basis.

Locomotives, passenger, coal for.
" freight, coal for.
" passenger, oil, tallow, waste for.
" freight, oil, tallow, waste for.
Charge to the lines upon which the service is performed.
272 If over two or more branches distribute the expense upon an engine-mileage basis.

Locomotives, passenger, repairs of.
Charge the total expense to all of the lines upon an engine-mileage basis.

Locomotives, freight, repairs of.
Charge the total expense to all of the lines upon an engine-mileage basis.

Locomotives, passenger, wood for.
" freight, "
Distribute the expense upon the same basis as locomotives, coal for.

Locomotives, furniture and fixtures of.
Distribute the expense upon the same basis as locomotives, repairs of.

Locomotives, hire of.
Charge to the lines upon which the service is performed.

Printing and stationery.
Charge the total expense to all of the lines upon an engine-mileage basis.

Stations, fuel, expenses of, repairs of.
Charge the total expense to all of the lines upon an engine-mileage basis.

Stations, water, expense pumping.
" " repairs of.
Charge the total expense to all of the lines upon an engine-mileage basis.

Superintendence.
Charge the total expense to all of the lines upon an engine-mileage basis.

Tools and machinery, expenses and repairs of.
Charge the total expense to all of the lines upon an engine-mileage basis.

Watchmen.

Charge to the line where the service is performed. If at a point common to two or more branches, divide the expense according to the number of engines handled.

Wipers, hostlers, and despatchers.

Distribute upon the same basis as watchmen.

Maintenance of Cars.

The total expense of maintenance of cars to be apportioned to all of the lines upon a car-mileage basis, the repairs of passenger, express, mail, and baggage cars to be apportioned upon mileage of passenger cars, and of freight cars upon mileage of freight cars; all of the other expenses upon freight and passenger mileage.

273 *Maintenance of Way.*

All of the expenses of maintenance of way to be distributed according to the location of the work done, each line being charged with its own expenses; general expenses common to the entire line, or expenses at stations common to two or more branches, to be distributed as set forth below:

Incidentals.

All expenses which can be located to be charged to the line for which the expense is incurred; all general expenses to be distributed to all of the lines upon the basis of earnings.

Printing and stationery.

To be charged upon the same basis as incidentals.

Superintendence and supervisors.

All expenses common to the entire line to be distributed upon the basis of earnings; salaries and expenses of resident engineers, division superintendents, and others whose supervision extends over divisions to be divided to the lines in the division upon the basis of earnings.

Tools and repairs tools.

Expenses common to the entire line to be divided on the basis of earnings; all other expenses to be charged directly to the line for which the expense is incurred.

Watchmen of roadway and bridges.

To be charged to the line where the service is performed; if at a crossing common to two or more branches the expense to be divided upon the same basis as station agents.

General Expenses.

All general expenses to be apportioned to all of the lines upon the basis of earnings.

274 EXHIBIT 101, J. F. A.

Statement of Main Line and Other Lines Earnings on Business from the St. Joseph and St. Louis R. R., May 29th, 1884, to June 30th, 1885.

May 29th to June 30th,	1884	18,698 87
July,	"	9,122 92
August,	"	11,140 68
September,	"	12,983 44
October,	"	14,323 95
November,	"	13,637 93
December,	"	20,526 58
January,	1885	21,726 13
February,	"	11,447 98
March,	"	15,779 93
April,	"	13,800 01
May,	"	15,173 10
June,	"	9,790 87
		188,152 39

NOTE.—The above figures embrace earnings on business coming from points on St. Joseph and St. Louis R. R., the earnings of the other lines of the system, as above, being in the same proportion to the total through earnings as the distance carried over such lines bears to the total distance carried.

Income Account of the St. Joseph and St. Louis Railroad, May 29th, 1884, to June 30th, 1885.

	May 29th to June 30th, 1884.	July, 1884.	August, 1884.	September, 1884.	October, 1884.	November, 1884.	December, 1884.	January, 1885.	February, 1885.	March, 1885.	April, 1885.	May, 1885.	June, 1885.	Total.
Earnings:														
Freight	9,886 53	6,792 12	9,754 83	10,806 42	11,289 79	10,328 44	12,472 64	13,727 04	12,686 80	13,615 54	10,709 76	10,447 79	7,668 54	140,186 24
Passengers	2,736 83	2,905 28	3,580 65	4,483 19	3,470 50	2,548 39	2,974 02	2,280 92	2,308 92	2,577 89	2,411 57	2,991 59	2,720 20	37,989 95
Mails	499 53	455 45	455 45	455 45	455 45	455 45	455 45	455 45	455 45	455 45	455 45	455 45	455 45	5,964 93
Express	250 00	250 00	250 00	250 00	250 00	250 00	250 00	250 00	250 00	250 00	250 00	250 00	250 00	3,250 00
Miscellaneous	106 39	139 27	83 81	92 18	201 12	170 75	150 62	190 69	183 98	185 25	178 86	160 22	122 09	1,956 23
	13,479 28	10,533 12	14,124 74	16,087 24	15,666 86	13,753 03	16,302 73	16,904 10	15,885 15	17,084 13	14,005 64	14,305 05	11,216 28	189,347 35
Pool earnings					645 46							123 64		769 10
	13,479 28	10,533 12	14,124 74	16,087 24	16,312 32	13,753 03	16,302 73	16,904 10	15,885 15	17,084 13	14,005 64	14,428 69	11,216 28	190,116 45
Expenses:														
Operating expenses, ordinary	21,202 98	18,686 21	17,523 91	31,788 09	19,861 98	21,703 43	20,196 54	17,663 56	16,857 66	16,981 50	16,868 33	15,005 07	14,355 66	248,694 92
Operating expenses, extraordinary		103 82	238 30	370 76	277 77	279 82	301 49	336 20	178 99	71 92	209 47	117 44	257 49	2,743 47
Taxes paid	184 10				3,918 29									4,102 39
Pool balances					53	8 02	2,015 73	37 54	71 11	58 92	105 09		183 51	3,580 45
Proportion of interest, New York & Pacific Car Trust							1,095 19		347 52	137 86		412 94	209 07	2,202 58
	21,387 08	18,790 03	17,762 21	32,158 85	24,058 57	21,991 27	23,608 95	18,037 30	17,455 28	18,350 20	17,182 89	15,535 45	15,005 73	261,323 81
Deficit	7,907 80	8,256 91	3,637 47	16,071 61	7,746 25	8,238 24	7,306 22	1,133 20	1,570 13	1,266 07	3,177 25	1,106 76	3,789 45	71,207 36

NOTE.—The above statement includes receivers' proportion of taxes paid for the year 1884..... $4,102 39
Estimated taxes, May 29th, 1884, to June 30th, 1885, as per report to the court..... 7,419 10

Exhibit 102, J. F. A.

276 Thereupon and on the 14th day of the same month intervenor filed its exceptions thereto; which said exceptions are in words and figures as follows, to wit:

Exceptions to Master's Report.

THE CENTRAL TRUST COMPANY OF NEW YORK *et al.* *vs.* THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.* } Consolidated Cause.

In the matter of the intervening petition of the St. Joseph & St. Louis Railroad Company.

To the honorable judges of said circuit court:

Now, this day, comes the St. Joseph & St. Louis Railroad Company, intervenor, and files its exceptions to the report of the master filed herein on its intervening petitions and claims for rent, and for said exceptions says:

1st. Said intervening excepts to the action of the master in overruling its exceptions to portions of the answer of the receivers herein.

2nd. Said intervenor excepts to the failure of the master to make any finding as to the allegations of breaches of covenant on the part of the lessee prior to the appointment of the receivers.

3rd. The master finds and reports that the outlays by the receivers were extraordinary, but finds that they were caused only in part by the failure of the lessee to keep intervenor's road in repair in accordance with the covenants of the lease, whereas the evidence shows that the said repairs were wholly necessitated by said failure of the lessee; and to such finding of the master intervenor excepts.

4th. Intervenor further excepts to the supplemental finding
277 of the master that extraordinary outlays upon said road will be for months, and perhaps years, to come still required, for the reason that said finding is not supported by the evidence.

5th. Intervenor excepts to the failure of the master to find what the evidence shows to be the fact, that not only a part, but the greater part, of the expenses incurred by the receivers were for repairs and betterments, which repairs and betterments arose from the failure of the original lessee and its successor to put and keep the road of intervenor in the condition in which it was to be put and kept by the covenants of the lease.

5th. Intervenor excepts to that part of the supplemental report of the master in which he finds that the intervenor's road has been of no benefit to the entire system in the hands of the receivers, and that the profits on the carriage of goods delivered to the main line by the intervenor's road or hauled over the main line destined for points on the intervenor's road have not equalled the losses incurred by the receivers in operating intervenor's road, for the reason that said finding is not supported by the evidence; that the evidence

shows that the road of intervenor has been of benefit to the entire system, and that the cash amount to be credited to the intervenor on said account nearly or quite equals the alleged difference between the receipts from said road and its operating expenses.

7th. And the intervenor also excepts to the finding of the master that intervenor's road is neither necessary nor valuable to the Wabash system as a feeder, and says that the evidence before the master proves the contrary to be the fact.

8th. Intervenor further excepts to the failure of the master to find that the road of intervenor might be as cheaply managed and operated as most of the other roads running out of St. Joseph, and says that the evidence shows such to be the fact.

277½ 9th. And intervenor further excepts to the report of the master because he has failed to find what the evidence shows to be the fact, that both of the receivers, as well as their manager, Mr. How, were well acquainted with the condition of intervenor's road at the time of the appointment of the receivers, and had been familiar with its condition for a long time anterior to such appointment.

10th. And intervenor further excepts to the finding and conclusion of the master that the order of the court of May 29th, 1884, does not apply to this intervenor nor to its claim for rent, and intervenor says that under said order it is entitled to receive the rent claimed in its intervening petitions.

11th. And for further exception intervenor says that the finding of the master that the receivers, by entering under the lease, have not adopted said lease and are not bound by its terms and covenants is contrary to the law and the evidence; and intervenor insists that under the evidence before the master and the law governing the case the receivers elected to adopt the lease and are bound by the covenants thereof, and the master should have so found.

12th. Intervenor further excepts to the recommendation of the master that the amount of rental accrued prior to the appointment of the receivers constituted only an unsecured claim; that under the law and the evidence produced before the master the same should have been held to have been a lien upon the moneys in the hands of the receivers and placed upon the same footing as the other operating expenses of the road.

13th. And for further exception intervenor says that the master has failed to make any specific finding with reference to the rental accrued after the road of intervenor came into the possession of the receivers, to wit, that which accrued between

278 the 29th day of May, 1884, and Sept. 1, 1884, and has made no disposition of its said claim thereto. Intervenor insists that the amount of the rental accrued while the road of intervenor has been in possession of the receivers, at least such part as accrued to April 16th, 1885, the date of the last order of this court, is and should be declared to be a debt due and payable to intervenor out of any moneys in the hands of the receivers; that the same constitutes a part of the operating expenses of the system, and is a lien prior in equity to the claims of any mortgagees or bondholders; and

intervenor in like manner and for the same reasons excepts to the finding of the master that the rent accrued during the six months ending March 1st, 1885, constitutes only an unsecured claim against the Wabash, St. Louis & Pacific Railway Company.

14th. Intervenor excepts to the failure of the master to find that intervenor is entitled to the penalty provided in the lease for failure to pay rental when due.

15th. The master has failed to find and report whether or not the St. Louis, Kansas City & Northern Railway Company has always earned more than enough to pay its fixed charges and interest on all the bonds issued by it prior to the consolidation with the Wabash Railway Company, which fact the evidence clearly shows.

16th. The master has failed to find and report whether or not the Wabash, St. Louis & Pacific Railway Company has always earned more than enough to pay its fixed charges and the interest on the bonds which has been issued prior to the lease of intervenor's road to the St. Louis, Kansas City & Northern Railway Company, which fact the evidence clearly shows.

17th. Intervenor also excepts to the following finding of the master, to wit: "I find from the evidence that the operation
279 of the St. Joseph & St. Louis Railroad Company has been a burden to the rest of the property in charge of the receivers since their appointment without reference to the rental charged;" to which part of the finding intervenor excepts because the same is not supported by the evidence, but is contrary to the evidence, and, further, because such fact, if it be a fact, is no defense to a claim by intervenor for its rental under the lease during the time the receivers have been in possession of its said road.

18th. Intervenor also excepts to the following finding by the master, to wit, "That in all reasonable probability it (the St. Joseph & St. Louis railroad) will continue to be a burden if operated by the receivers as heretofore for an indefinite period," for the reason that said finding is not supported by the evidence, but is contrary to the evidence, and, even if true, constitutes no defense to a claim by intervenor for its rental under said lease.

19th. Intervenor also excepts to that part of the supplemental finding of the master in which he states "but the evidence does not satisfy me that a compliance with the terms of the lease by the lessee and its successor or the receivers would, at any time since the date of the lease, have resulted in any profit from the operation of the road," for intervenor says that there was sufficient evidence on this point to show that the road of intervenor, if it had been properly kept up and operated, would have been of benefit and profit to the lessee as well as to the receivers.

20th. Intervenor also excepts to the admission in evidence by the master of the paper purporting to show the details of expenses in-
280 curred by the receivers on intervenor's road and the cost of rails, bridges, &c., laid and built thereon by the receivers, for the reason that it is at best but secondary evidence; that no witness was put upon the stand who made up the paper or who could swear from his personal knowledge that the statements made

therein were correct; that no witness did testify that they were correct, and because no opportunity was given to cross-examine the persons by whom said paper was made up or any witness as to the correctness of the statements therein contained.

21st. And for a further exception the intervenor says that the master has erred in sustaining the objections made by the receivers to the following interrogatories in the deposition of William F. Nisbet, said interrogatories having been propounded by the intervenor herein, and being numbered interrogatories 33, 40, 41, 42, 43, 44, 46, 47, 48, 49, 50, 51, 52, and 57, for the reason that the interrogatories above mentioned, and to which objections were sustained by the master, called for statements made by one Galvin, who was at that time the agent of the receivers and was engaged in the business of his department, and were made while in the actual employ of the receivers, and were in reference to matters pertaining to the department in which he was so employed; also interrogatories numbered 64, 65, 73, 74, 76, and 77, for the reasons above stated, said interrogatories calling for statements made by one Russell, who was at the time in the actual employ of the receivers, the statements made by him being made while actually engaged in the duties of his business, and pertaining to the department in which he was employed.

Wherefore intervenor prays that its said exceptions be allowed, and that said case be referred back to the master for his further action therein in accordance with the direction of this court, or that this court do now reject the report and recommendations of said master and order the rental accrued under said lease to be
281 paid to the said intervenor according as it shall to this court seem meet and just.

By PATTISON & CRANE,
Its Solicitors.

On the 9th day of November, 1885, the following order was made by the court in said cause, to wit:

282 In the Circuit Court of the United States for the Eastern District of Missouri.

THE CENTRAL TRUST COMPANY OF NEW YORK and JAMES CHENEY, Complainants, *vs.* THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.*, Defendants.	In Chancery. Nos. 2357 and 2464 Consolidated.

Order of Reference to Master to Take Account, etc.

NOVEMBER 9, 1885.

Now, on this day, come the Central Trust Company of New York and James Cheney by Butler, Stillman & Hubbard and Phillips & Stewart, their solicitors, and the Mercantile Trust Company of New York by H. S. Greene, its solicitor, and, upon motion, it is ordered

that this cause be referred to Edmund T. Allen, as special master, to take and report with all convenient speed evidence and his conclusions on the following questions and matters:

283 1. The number and amount of the general mortgage bonds issued by the Wabash, St. Louis and Pacific Railway Company and secured by the general mortgage executed on the 1st day of June, 1880, to the Central Trust Company of New York and James Cheney, trustees. The said master will report the amount of the principal of all of said bonds now outstanding and unpaid, the amount of interest due on said bonds and on the coupons attached thereto, calculating the interest on said coupons at six per cent. per annum from the maturity thereof; said master will calculate all the interest on said bonds and coupons up to the 1st day of December, 1885, and will, so far as convenient, report the names of present owners of said bonds and coupons.

2. The said master will also report upon the like questions in all respects as to the collateral trust bonds secured by collateral trust dated May 1st, 1883, executed by said Wabash, St. Louis and Pacific Railway Company to the Mercantile Trust Company of New York, as trustee.

3. Said master will also report whether default was made by the Wabash, St. Louis and Pacific Railway Company in the payment of interest maturing on any of the bonds or coupons aforesaid and when such default or defaults occurred, and whether any demand for payment of same was at any time made or whether it was waived, and what notices were given under said collateral trust before the Mercantile Trust Company filed its cross-bill.

4. Said master will also report whether said railway company on the 1st day of June, 1880, or at any time thereafter, owned or acquired any lines of railroad, interests, or property (other than that specified in the collateral trust mortgage) and which were not specifically described in said general mortgage, and, if any be found, he will describe the same with reasonable certainty.

284 5. Said master will also report with reasonable certainty the amount of indebtedness secured by liens on the property of said Wabash Railway Company or any part thereof prior in point of time to the lien of the general mortgage or collateral trust mortgage, or which are made superior thereto by the said last-named mortgages or either of them. He will report the time up to which interest has been paid on all such prior liens and the time to which rents have been paid on all leasehold interests and what remains unpaid thereon.

6. Said master will also report the amount of indebtedness already incurred by the receivers herein, specifying the amount of receivers' certificates now outstanding, together with the date of issue and rate of interest thereon; also all other claims or accounts allowed and unpaid which have been declared to be, by the order of this court or other courts entertaining ancillary jurisdiction of this cause, liens superior in right to the liens of the mortgages securing bonds aforesaid, and the current indebtedness of said receivership to date of

his report, approximating said last-named sum as nearly as possible.

7. Said master will also report the probable amount of costs incurred in this cause in this court and in all courts entertaining ancillary jurisdiction thereof; also the amount of reasonable compensation to be paid to said trustees, receivers, their solicitors and counsel, for services already rendered.

8. Said master will also report as to the agreement alleged in the cross-bill of the Mercantile Trust Company to have been made between the holders of the collateral trust bonds and a majority of the holders of the general mortgage bonds, specifying the terms thereof and the number of bonds the owners or holders of which have accepted the same.

285 9. Said master will report whether said Wabash Railroad Company is insolvent and whether the property embraced in said mortgages is sufficient security therefor.

10. Said master will also report a sufficient description of the real estate interest in Cook county, Illinois, embraced in said collateral trust.

11. Said master will also take evidence and report upon such other matters pertinent to the issues made herein as may be brought before him.

It is ordered that said master take such portions of the evidence on said questions and matters as may be taken most conveniently in the city of New York or elsewhere, particularly when a number of witnesses reside in said city or away from the city of St. Louis.

12. Said special master shall fix the time and place for hearings under this order, giving at least five days' written notice to the counsel of the trustees of the general and collateral trust mortgages respectively, and by publication for at least five days in some daily newspaper of the locality where any hearing may be held.

286 On the 21st day of November, 1885, said intervenor filed the following petition addressed to the master, to wit:

Petition of Intervenor to Master.

THE CENTRAL TRUST COMPANY OF NEW YORK *et als.*, Complainants, *vs.* WABASH, ST. LOUIS & PACIFIC RAILROAD COMPANY *et al.*, Defendants.	Consolidated Cause.

Now, this day, comes the St. Joseph & St. Louis Railroad Company and represents to the master that under the order of the circuit court of November 9th, 1885, referring to the master to take evidence and report his conclusions on the following questions and matters, among other things, on the following:

"6. Said master will also report the amount of indebtedness already incurred by the receivers herein, specifying the amount of receivers' certificates now outstanding, together with the date of issue

and rate of interest thereon; also all other claims or accounts allowed and unpaid which have been declared to be by the order of this court or other courts entertaining ancillary jurisdiction of this cause liens superior in right to the liens of the mortgages securing bonds aforesaid, and the current indebtedness of said receivership to date of his report, approximating said last-named sum as nearly as possible." Said St. Joseph & St. Louis Railroad Company presents its claim for rentals accrued up to this date and asks that they be allowed and declared to be a lien superior in right to the liens of the mortgages securing the bonds referred to in said order.

Said rentals amount as follows: Up to the 1st day of September, 1884, $27,420.79; up to the 1st day of March, 1885, $28,572.37; up to the 1st day of September, 1885, $25,936.96.

And said St. Joseph & St. Louis Railroad Company further presents to the master the statements furnished it by the auditor
287 of the said system in charge of the receivers, showing the gross earnings of said road during the six months ending September 1st, 1885, of which thirty per cent., being the rental under the lease, amounts to the sum last above mentioned. Said statements for March, April, May, and June are filed as a part of Exhibit 102, attached to the record in the matter of the intervening petition of said St. Joseph & St. Louis Railroad Company. True copies of the statements for July and August are filed herewith.

By PATTISON & CRANE,
Its Solicitors

Earnings and Expenses of the St. Joseph and St. Louis R. R. July, 1885.

Earnings:		
Freight	8,560 42	
Passengers	4,605 20	
Mails	455 45	
Express	250 00	
Miscellaneous	182 48	
		14,053 55
Expenses:		
Conducting transportation	5,339 73	
Motive power	3,802 00	
Maintenance of way	1,494 89	
Maintenance of cars	628 06	
General expenses	318 77	
		11,583 45
Surplus		2,470 11

Earnings and Expenses of the St. Joseph and St. Louis R. R. August, 1885.

Earnings:		
Freight	11,418 70	
Passenger	3,457 37	

Mails	455 45	
Express	250 00	
Miscellaneous	86 71	
		15,668 23
Expenses:		
Conducting transportation	5,054 05	
Motive power	4,972 69	
Maintenance of way	3,831 24	
Maintenance of cars	681 07	
General expenses	359 00	
		14,898 05
Surplus		770 18

288 The report of the master under the order of November 9th, 1885, hereinbefore set out, contained the following paragraph, disposing of the petition of intervenor last above mentioned, to wit:

Paragraph of Master's Report under Order of Reference of Nov. 9, 1885, to Take Account, &c.

"The master further states that he has found among the papers filed in the clerk's office of the United States circuit court for the eastern district of Missouri a petition, filed November 1st, 1885, addressed to him as special master, in behalf of the St. Joseph and St. Louis Railroad Company, asking him to find an allowance and declaration under paragraph 6 of the order of reference that the accrued rentals in favor of the said railroad company, the amounts of which are stated in the petition, constitute a lien superior to the lien of the mortgages securing the bonds referred to in said order. The master declines to entertain the petition or to make further reference thereto in the record of proceedings or in his report."

To this part of said report intervenor filed its exceptions on the 14th day of January, 1886; which said exceptions are in words and figures as follows, to wit:

Exceptions to said Report.

In the United States Circuit Court, Eastern District of Missouri.

THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY CO. *et als.*

Consolidated cause.

Now, on this day, comes the St. Joseph & St. Louis Railroad Company and excepts to so much of the report of the special master made pursuant to the order of said court of date November 9, 1885,

as relates to the claim of the said St. Joseph & St. Louis Rail-
289 road Company against the receivers of said first-named defendant, the part especially excepted to being the last paragraph but one on page 280 of the printed report, and being in words as follows, to wit:

"The master declines to entertain the petition or to make further reference thereto in the record of proceedings or in his report."

For this exceptor says that the prayer of its petition therein referred to should have been granted and the said master should have found that the claim therein made constitued an equitable lien against the proceeds of the sale superior to the claims of the bondholders and each of them, and should have recommended payment of said claim accordingly.

Furthermore, this exceptor excepts to the finding of the master, as shown by Exhibit 21 (p. 94 of the printed exhibits), of the amount due it for rental, for said exceptor, the St. Joseph & St. Louis Railroad Company, says that the figures given therein are incorrect, in this:

The rent accrued March 1, 1885, was and is $28,572.37 instead of $28,379.74, as stated in said Exhibit 21.

The rent accrued Sept. 1, 1885, was and is $25,936.96 instead of $25.899.85, as stated in said exhibit.

Wherefore said St. Joseph & St. Louis Railroad Company prays that these its exceptions may be allowed.

Respectfully submitted to the master by—

PATTISON & CRANE,
Its Solicitors.

On the 10th day of May, 1886, intervenor filed a second supplemental petition, asking for the payment of rentals accruing subsequent to those asked for in the first supplemental petition, to wit, from March 1st, 1885, to April 24th, 1886, on which latter
290 date its road was surrendered to it by the receivers. Said second supplemental petition is in words and figures as follows, to wit:

Second Supplemental Petition.

THE CENTRAL TRUST COMPANY OF NEW YORK *et als.*, Complainants,
vs.
WABASH, ST. LOUIS & PACIFIC RAILROAD COMPANY *et als.*, Defendants.
} Consolidated Cause.

Now, this day, comes the St. Joseph & St. Louis Railroad Company and files this its supplemental intervening petition in said cause, and prays for an order upon the receivers to pay to it the rent due it for the year commencing March 1st, A. D. 1885, and ending February 28th, 1886.

Your petitioner states that said rent is due to it under the lease executed by your petitioner to the St. Louis, Kansas City & North-

ern Railroad Company, of date June 1st, 1874, the terms and provisions of which said lease are fully set out in the first intervening petition filed by the petitioner in this cause; and reference is hereby made to said first intervening petition, as also to the exhibit to the bill of complaint of the Wabash, St. Louis & Pacific Railway Company filed in said cause; which said exhibit is the lease aforesaid and is called in said bill of complaint sub-Exhibit F No. 18; and your petitioner begs leave to make said exhibit and the provisions of said lease, as set out in its said first intervening petition, a part of this supplemental intervening petition.

Your petitioner states that the gross earnings of its said road from the first day of March, 1885, to the 28th day of February, 1886, inclusive, were as follows, to wit: For March, $17,084.13; April, $14,005.64; May, $14,305.05; June, $11,246.28; July, $14,-
291 053.55; August, $15,668.23; September, $19,966.74; October, $21,218.16; November, $12,425.35; December, $19,000.85; January, $12,262.30; February, $19,495.01, the aggregate of said gross earnings for said year being $190,701.29.

Your petitioner further states that under and by virtue of the terms of said lease the rent due to it for the time aforesaid is thirty per cent. of said gross earnings, which said thirty per cent. amounts to the sum of $57,210.38.

Your petitioner further states that the said sum has not been paid to it by said receivers, nor has any part thereof been paid it; but the whole is still due and unpaid, and has been due and unpaid as follows, to wit: $25,899.86 since the first day of September, 1885, and the balance, to wit, $31,310.52, since the first day of March, 1886; that under the terms of said lease it is entitled, as a penalty by reason of the non-payment of said rent at the time it became due and accrued, — one-tenth of one per cent. for each day the same has remained due and unpaid, to wit, one-tenth of one per cent. on $25,899.86 from the 1st day of September, 1885, and on the remaining sum, $31,310.52, from the 1st day of March, 1886.

Wherefore your petitioner prays for an order upon the receivers to pay to it the several sums above mentioned.

Your petitioner also states that there is a further amount due to it as rent, to wit, thirty per centum of the gross earnings of its said road from the 1st day of March, 1886, to the date on which said road was surrendered by the receivers, under the order of this court, to your petitioners, to wit, the 24th day of April, A. D. 1886; that the amount of said gross earnings for the last-mentioned period has not yet been ascertained by the officers acting under the receivers, who were up to the 24th day of April in charge of your petitioner's said road; but your petitioner asks that the same may be ascer-
292 tained by the master, and when ascertained that an order be made that thirty per cent. thereof be paid to your petitioner as rent for said last-mentioned time.

And as in duty bound will ever pray, &c.

By PATTISON & CRANE,
Its Solicitors.

On the 25th day of May, 1886, said receivers filed their answer to said second supplemental petition; which said answer is in words and figures as follows, to wit:

Answer of Receivers to Second Supplemental Petition.

In the Circuit Court of the United States for the Eastern District of Missouri.

THE CENTRAL TRUST COMPANY OF NEW YORK *et als.*, Complainants,
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et als.* } Consolidated Cause.

The answer of Solon Humphreys and Thomas E. Tutt, receivers, to the second supplemental intervening petition of the St. Joseph & St. Louis Railroad Company.

Said receivers, saving and reserving unto themselves, now and at all times hereafter, all and all manner of benefit and advantage of exception which can or may be had and taken to said intervening petition, for answer thereto, or to so much and such parts thereof as they are advised is material for them to make answer unto, answering, say—

That it is not true that they, as receivers of the property of the Wabash, St. Louis and Pacific Railway Company, by any act of theirs or any order of the court by which they were appointed, adopted in whole or in part the covenants and obligations of the lease made by the said St. Joseph and St. Louis Railroad
293 Company to the St. Louis, Kansas City and Northern Railway Company on or about the first day of June, 1874.

These receivers, further answering, say that they did, pursuant to the order of this honorable court in that behalf duly entered, take charge of and operate the said St. Joseph and St. Louis railroad from and after the 29th day of May, 1884, until the 24th day of April, 1886, for the purpose of preserving said property and preventing a forfeiture of the charter thereof.

Said receivers aver that at all times after they took charge of and commenced operating said St. Joseph and St. Louis railroad they were compelled to expend large sums of money in the maintenance and operation thereof in excess of the earnings received therefrom.

Said receivers, further answering, say that the said St. Joseph and St. Louis Railroad Company might at any time after the said property had been placed in their charge for the purposes aforesaid have obtained the possession thereof.

Wherefore they say that the petitioner is not entitled to have and recover of them the rents prayed for by said intervening petition or to any other relief whatsoever.

SOLON HUMPHREYS, THOMAS E. TUTT, } *Receivers.*

By H. S. PRIEST,
GEO. S. GROVER, *Sol'rs.*

On the 9th day of April, 1886, said court made an order on the receivers directing them to deliver to intervenor its road and property on the 24th day of April, 1886; which said order is in words and figures as follows, to wit:

294 In the Circuit Court of the United States for the Eastern District of Missouri.

THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants, *vs.* THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.*, Defendants.	In Equity. Nos. 2357 and 2464. Consolidated Cause.

Order in Re Application of The St. Joseph and St. Louis Railroad Company to Forfeit Lease.

APRIL 9TH, 1886.

The report of the master filed herein having been considered by the court, it is ordered that said report be, and the same is hereby, in all things confirmed.

And thereupon it is ordered that the receivers herein do, on the 24th day of April, 1886, transfer and surrender to the St. Joseph and St. Louis Railroad Company the possession of the entire line of said St. Joseph and St. Louis railroad, extending from a point in the county of Ray, in the State of Missouri, on the north bank of the Missouri river opposite the city of Lexington, Missouri, to the city of St. Joseph, Missouri, together with all the property, real and personal, belonging and pertaining to said railroad company and now in the possession and control of said receivers.

295 The surrender and transfer under this order of the aforesaid property shall not be held to divest this court of the jurisdiction of said property or of the lessor thereof in this cause, but the same shall continue to be subject to such jurisdiction until the further order of this court, and by due notice by order of this court the said St. Joseph and St. Louis Railroad Company or its assigns shall hereafter appear in this court in response to any action by motion, bill, cross-bill, counter-claim, or otherwise that shall be filed herein.

This order shall in no manner prejudice or curtail the right of the said St. Joseph and St. Louis Railroad Company to prosecute its intervening petition and its supplemental intervening petition filed in this cause for the collection of the rent which it claims is due to it from the receivers for the period or any portion thereof between the first day of March, 1884, and the first day of March, 1885, and prosecute its demand, by way of supplemental intervening petition or otherwise, for rent for the term after the first day of March, 1885, and until the date when the receivers shall surrender the said railroad under this order, or to make demand in this court by way of intervening petition, cross-bill, or counter-claim for any other claim or right which said St. Joseph and St. Louis Railroad Company may

have against said receivers or said Wabash, St. Louis and Pacific Railway Company.

This court, however, reserves to itself any and all jurisdiction which it now has to determine any and all questions as to what indebtedness of the Wabash, St. Louis and Pacific Railroad Company or its receivers, if any, shall be enforced as a lien upon or against the said property and premises hereby turned over to said St. Joseph and St. Louis Railroad Company and which existed at the date of the appointment of the receivers herein or now exists.

296 On the 24th day of April, 1886, the receivers, in accordance with the foregoing order of the court, surrendered to intervenor its railroad and other leased property, and intervenor took possession thereof and has ever since operated the same.

On the 7th day of August, 1866, intervenor filed an application for the payment of its rentals out of the proceeds of the foreclosure sale, and on the 22nd day of September, 1886, filed its amended application covering the same ground, which amended application is in words and figures as follows, to wit:

Amended Application of Intervenor for Payment of its Rental out of the Proceeds of Foreclosure Sale.

In the United States Circuit Court for the Eastern District of Missouri.

CENTRAL TRUST COMPANY OF NEW YORK *et als.*, Complainants, *vs.* WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et als.*, Defendants.	Nos. 2357, 2464. Consolidated Cause.

In the matter of the St. Joseph & St. Louis Railroad Company.

Now, this day, comes the St. Joseph & St. Louis Railroad Company, a corporation existing under the laws of the State of Missouri, and, leave of court having been granted it to amend its application filed herein on the 7th day of August, 1886, represents to the court that it has heretofore filed in this cause a certain intervening petition, and also certain supplemental intervening petitions, claiming certain amounts due to it as rent from the time when the receivers took possession of the property of the defendants, The Wabash, St. Louis & Pacific Railway Company, viz., the 29th of May, 1884,
297 down to the 24th day of April, 1886, when your petitioner's property was surrendered to it. Your petitioner respectfully shows to the court that the said rent was due under a lease originall- made in the year 1874 by your petitioner to the St. Louis, Kansas City & Northern Railroad Company, which said lease was adopted by the receivers of said defendant, The Wabash, St. Louis & Pacific Railway Company, and your petitioner's road operated thereunder by said receivers, and it forms one of the exhibits in the bills

filed in the above-entitled cause and is fully referred to in the intervening petition filed by your petitioner as aforesaid. The amount of said rental has been ascertained by the master and reported by him to the court in certain reports and supplemental reports made and filed by said master in this cause, as also in a supplemental report, prepared and about to be filed, covering the period from March 1st, 1885, to April 24th, 1886, the aggregate amount due it since the said 29th of May, 1884, being $121,427.69.

Your petitioner states, as is alleged in the intervening petitions and supplemental intervening petitions hereinbefore referred to, that the said receivers of the Wabash, St. Louis & Pacific Railway Company took possession of your petitioner's said road under the lease aforesaid, and adopted the same and elected to enter thereunder, and operated said road from the 29th day of May, 1884, to the 24th day of April, 1886, on which last-mentioned date said lease was cancelled; that the said claim of your petitioner for the rent found by the master to be due to it under said lease constitutes and in equity ought to constitute a demand and lien against the proceeds of the sale of said Wabash, St. Louis & Pacific Railway Company under foreclosure; and furthermore that said claim is a lien prior in equity to any claim or lien of the complainants in this case or of any bondholders or mortgagees or other lessors
298 or creditors of any kind or nature whatsoever.

Your petitioner prays, therefore, for an order of this court that out of the gross proceeds of the foreclosure sale aforesaid, which have been or which may be paid into this court by the purchasers at the said sale, there be paid to it the sum of $121,427.69, being the aggregate amount of the rent due to it, as also the penalty provided by said lease of one-tenth of one per cent. per day on the following sums from the following dates, to wit: $27,420.79 from the 1st day of September, 1884; $28,379.73 from the 1st day of March, 1885; $25,899.86 from the 1st day of September, 1885; $31,310.52 from the 1st day of March, 1886, and $8,224.15 from the 24th day of April, 1886; or in case the said amount paid by the purchasers for the road is not sufficient to pay said aggregate amounts above mentioned, or in case the same shall have been absorbed in the payment of other claims of like nature, then that the purchasers aforesaid be ordered to pay such rental and penalty as aforesaid before the property so sold as aforesaid under foreclosure shall be delivered or released to them and before the title thereto shall be perfected in them; and, as in duty bound, your petitioner will ever pray, &c.

By PATTISON & CRANE,
Its Solicitors.

On the 9th day of November, 1886, said receivers filed their plea to the said amended application of intervenor; which said plea is in words and figures as follows, to wit:

Plea of Receivers to said Application.

In the Circuit Court of the United States for the Eastern District of Missouri.

CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants, *vs.* WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.*, Defendants.	Consolidated Cause. No. 2357 and 2464. In Equity.

299 The plea of Solon Humphreys and Thomas E. Tutt, receivers of the Wabash, St. Louis and Pacific Railway Company, to the amended application of the St. Joseph and St. Louis Railroad Company.

Said receivers, by protestation, not confessing or acknowledging all or any of the matters and things in the complainant's said amended application mentioned to be true in such manner and form as the same are therein and thereby set forth and alleged, doth plead thereunto and for plea say—

1. That on or about the 25th day of November, 1884, The St. Joseph and St. Louis Railroad Company, intervenor herein, exhibited its intervening petition in this honorable court, praying for the same rental now alleged to be due and herein prayed for in this its said amended application, and also praying for relief in the same manner and for the same matters and to the same effect as said intervenor now prays for in its said amended application.

2. That the parties to this cause and also said receivers appeared and put in their separate answers to said intervening petition; that said matter was referred to Hon. E. T. Allen, special master, and testimony was taken before said master after issue was joined upon said intervening petition; that said master reported thereon on or about the 7th day of October, 1885, adversely to the claim of said intervenor; that intervenor filed its exceptions to said master's report on or about the 14th day of October, 1885, and that said intervening petition and the several proceedings in the said former cause now remain depending and as of record in this honorable court, the said cause being yet undetermined and undismissed.

All of which matters and things said receivers aver to be true, and plead the same to the whole of said amended application and demand the judgment of this honorable court whether they ought to be compelled to make any answer to said amended appli-
300 cation, and pray to be hence dismissed with their costs in this behalf most wrongfully sustained.

SOLON HUMPHREYS,
THOMAS E. TUTT,
Receivers.

By H. S. PRIEST,
GEO. S. GROVER,
Solicitors.

On the 20th day of December, 1886, the master filed his record of proceedings on the second supplemental petition of intervenor, including the stipulations as to evidence and as to the gross earnings of intervenor's lines during the period covered by said petition. Said record of proceedings is in words and figures as follows, to wit:

Record of Proceedings Before Master on Second Supplemental Petition.

In the Circuit Court of the United States for the Eastern District of Missouri.

THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants, *vs.* WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.*, Defendants.	In Chancery. No. 2357, No. 2464 (Consolidated).
ST. JOSEPH & ST. LOUIS RAILROAD COMPANY, Intervenor.	Master's No., 261; Clerk's No., 1162.

Record of proceedings before the master.

This second supplemental intervening petition of the St. Joseph & St. Louis Railroad Company, which was filed on May 10th, 1886, was first called for hearing on Monday, June 7th, 1886, at which time the intervenor appeared by E. W. Pattison, Esq.,
301 and the receivers by Messrs. Priest and Grover, and the hearing was adjourned until 11 a. m., July 12th, 1886.

Pursuant to adjournment, as above stated, on July 12th, 1886, the intervenor appeared by E. W. Pattison, Esq., and the receivers by Messrs. Priest and Grover, and the hearing was adjourned until 11 a. m., July 19th, 1886.

Pursuant to adjournment, as above stated, on July 19th, 1886, H. S. Priest, Esq., appeared for the receivers, no one appearing for the intervenor, and the hearing was adjourned until 11 a. m., July 22nd, 1886.

Pursuant to adjournment, as above stated, on July 22nd, 1886, the intervenor appeared by E. W. Pattison, Esq., and the receivers by H. S. Priest, Esq., and the case was submitted on the stipulation which is hereto attached.

EDMUND T. ALLEN,
Special Master.

After the petition was submitted, as above stated, a further stipulation was filed in the cause on the 21st day of October, 1886, which is also hereto attached.

EDMUND T. ALLEN,
Special Master.

Stipulation as to Facts.

CENTRAL TRUST COMPANY OF NEW YORK
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY CO.

In the matter of last intervening petition of the St. Joseph & St. Louis Railway Company for rent.

Counsel for petitioner and for the receivers agree that the following facts and figures are correct, and they are submitted to the master as the evidence in the cause:

1. The lease mentioned in the petition shall be considered in evidence as on the hearing of the prior intervening petitions.

302 2. The gross earnings of the petitioner from March 1st, 1885, to September 1st, 1885, were $86,332.88.

3. The rent for the six months last mentioned is 30 per cent. of above sum, being $25,899.85, and was due September 1st, 1885.

4. The gross earnings from September 1st, 1885, to March 1st, 1886, were $104,368.41.

5. The rent for the six months last mentioned is 30 per cent. of above sum, or $31,310.52, and was due March 1st, 1886.

6. The gross earnings from March 1st, 1886, to April 24th, 1886, were $27,413.82.

7. The rent for said last-mentioned period is 30 per cent. of said sum, or $8,224.14, and is now due.

PATTISON & CRANE,
Att'ys for Intervenor.
H. S. PRIEST,
Sol'r for Humphreys & Tutt.

Stipulation as to Answer of Receivers.

In the Circuit Court of the United States for the Eastern District of Missouri.

THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants,
vs.
THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.*, Defendants.
} Consolidated Cause. In Equity.

In the matter of the intervening petition of the St. Joseph and St. Louis Railroad Company for rents and the several supplemental petitions thereto concerning.

It is hereby agreed by and between the solicitors for the said St. Joseph and St. Louis Railway Company and Solon Humphreys and

Thomas E. Tutt, receivers, that the answer of said receivers
303 to the original petition filed herein shall be taken and considered, so far as it may be applicable, as the answer to the said several supplemental petitions of the intervenor.

And it is further hereby agreed that all the testimony taken upon the hearing of the original petition of intervenor and the answer of the receivers thereto shall, so far as it may be applicable to the several supplemental petition-, be received and considered as though taken upon the issues joined upon the said several supplemental petitions.

PATTISON & CRANE,
Att'ys for Intervenor.
H. S. PRIEST,
Sol'r for Humphreys & Tutt, Rec'rs, &c.

Stipulation as to Earnings of St. Joseph & St. Louis R. R.

In the Circuit Court of the United States for the Eastern District of Missouri.

THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants, *vs.* THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.*, Defendants. } In Equity.

In the matter of the last intervening petition of the St. Joseph and St. Louis railroad.

Stipulation.

It is hereby stipulated and agreed that the earnings arising from the operation of the St. Joseph and St. Louis railroad from March 1st, 1885, to August 31st, 1885, inclusive, were $86,332 88

And that the officers acting for the receivers would testify that the expenses for the same period were as follows:

Operating expenses, ordinary	$89,692 06	
" " extraordinary	928 23	
Proportion car-trust interest	1,247 11	
Pool balances	2,858 85	
Taxes, estimated	3,424 20	
		98,150 45
Deficit M'ch 1st to Aug. 31st, 1885		$11,817 57

That the earnings arising from the operation of said rail-
304 road from Sept. 1st, 1885, to Feb. 28th, 1886, were:

Earnings		$104,368 41
And that the officers for the receivers would testify that the expenses of said road for the same period were as follows:		
Operating expenses, ordinary	$95,727 39	
" " extraordinary	20 41	
Proportion car-trust interest	1,520 26	
Pool balances	5,472 63	
Taxes, estimated	3,381 08	
		106,121 77
Deficit Sept. 1st, 1885, to Feb. 28th, 1886		1,753 36

That the earnings arising from the operation of said railroad from March 1st to April 23rd, 1886, were:

Earnings		$27,040 68
And that the officers acting for the receivers would testify that the expenses of said road for the same period were as follows:		
Operating expenses, ordinary	$29,491 66	
" " extraordinary		
Proportion car-trust interest	543 40	
Pool balances	1,957 39	
Taxes, estimated	970 15	
		32,962 00
Deficit March 1st to April 23rd, 1886		5,921 32

PATTISON & CRANE,
Solicitors for Intervenor.
H. S. PRIEST,
Solicitor for Receivers.

On the 6th day of December, 1886, the master lodged with the clerk his report, being in words and figures as follows, to wit:

Master's Report.

In the Circuit Court of the United States for the Eastern District of Missouri.

THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants, *vs.* WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.*, Defendants.	In Chancery. No. 2357, No. 2464 (Consolidated).
ST. JOSEPH & ST. LOUIS RAILROAD COMPANY, Intervenor.	Master's No., 261; Clerk's No., 1162.

Pursuant to an order of reference to me, as special master, of this intervening petition, I was present at the witness-room, in the

Custom-House building, in the city of St. Louis, at 11 a. m. on Monday, June 7th, 1886, to hear the evidence, if any, relating to said petition, and the hearing was continued from time to time and evidence introduced, as will appear from the record of proceedings herewith filed. 305

Petition of the intervenor was filed May 10th, 1886, and is styled "Second supplemental intervening petition of St. Joseph & St. Louis Railway Company." It has reference to the rental claimed to have accrued under the lease which formed the basis of the petition by the same intervenor in master's No. 50 (clerk's No., —). In this second supplemental petition rental is claimed for the period beginning March 1st, 1885, and ending April 24th, A. D. 1886, the day when the St. Joseph & St. Louis railroad passed out of the possession of the receivers herein under the order of the court entered in this cause ——, 1886.

The answer of the receivers in substance denies that by any act of theirs, or any order of the court by which they were appointed, did they adopt in whole or in part the covenants or obligations of said lease; avers that they, pursuant to an order of this court in that behalf duly entered, took charge of and operated said St. Joseph & St. Louis railroad from and after the 29th day of May, 1884, until the 24th day of April, 1886, for the purpose of preserving said property and preventing a forfeiture of the charter thereof; that at all times — they took charge of and commenced operating said railroad they were compelled to expend large sums of money in the maintenance and operation thereof in excess of the earnings received therefrom.

By stipulation it was agreed that the answer of the receivers to the original petition filed by the intervenor should be taken and considered, so far as may be applicable, as the answer to said several supplemental petitions of the intervenor, and that all the testimony taken upon the hearing of the original petition of the intervenor and the answer of the receivers thereto should, so far as it may be applicable to the several supplemental petitions, be received and considered as though taken upon the issues joined upon the said several supplemental petitions. 306

I find from the stipulations of the parties that the gross earnings arising from the operation of the St. Joseph & St. Louis railroad by the receivers herein from March 1st, 1885, to August 31st, 1885, inclusive, were ---------- $86,332 88

That for the same period the cost of operating said road was as follows:

Operating expenses, ordinary	$89,692 06	
" " extraordinary	928 23	
Proportion car trust interest	1,247 11	
Pool balances	2,858 85	
Taxes, estimated	3,434 20	
		98,150 45

That the gross earnings from September 1st, 1885, to February 28th, 1886, inclusive, were 104,368 41

That for the same period the cost of operating said road was as follows:

Operating expenses, ordinary	$95,727 39	
" " extraordinary	20 41	
Proportion car trust interest	1,520 26	
Pool balances	5,472 63	
Taxes, estimated	3,381 08	
		106,121 77

That the gross earnings from March 1st, to April 23rd, 1886, were 27,040 68

That for the same period the cost of operating said road was as follows:

Operating expenses, ordinary	$29,491 66	
Proportion car trust interest	543 40	
Pool balances	1,957 39	
Taxes, estimated	970 15	
		32,962 60

On this showing, though the excess of cost of operating exceeds gross income derived from the said road by the receivers in the sum of $29,492.25, the intervenor prays an order on the receivers, requiring them to pay for the period ending September 1st, 1885, thirty per centum of said sum of $86,332.88, or 25,899 85

For the period ending March 1st, 1886, thirty per centum of $104,368.41, or 31,310 52

307 For the period ending April 24th, 1886, thirty per centum of $27,413.82, or 8,224 15

And further claims penalties under said lease by reason of the non-payment of said sums on the first day of September, 1885, and the first day of March, 1886, respectively, of one-tenth of one per centum for each day said sums of $25,899.85 and $31,310.52 have remained due and unpaid.

In my opinion the intervenor is not entitled, under the orders heretofore entered in this cause, to the relief prayed for, but that the amounts above named, to wit, $25,899.85, $31,310.52, and $8,244.15, should be allowed as general unsecured claims against the Wabash, St. Louis & Pacific Railway Company, with interest from the dates when they respectively matured at six per centum per annum.

Lodged in the clerk's office December 6th, 1886.

Intervenor filed exceptions Dec. 20th, 1886, but I see no reason to modify foregoing report.

EDMUND T. ALLEN.

On the 20th day of December, 1886, the intervenor filed exceptions to said report, being in words and figures as follows, to wit:

Exceptions to Master's Last Report.

THE CENTRAL TRUST COMPANY OF NEW YORK *et al.* *vs.* THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.* } Consolidated Cause.

In the matter of the intervening petitions of the St. Joseph & St. Louis Railroad Company.

To the honorable judges of said circuit court:

Now, this day, comes the St. Joseph & St. Louis railroad,
308 intervenor, and files its exceptions to the report of the master filed herein on its second supplemental intervening petition and claim for rent, and, for said exceptions, says:

1st. Intervenor excepts to the finding of the master, to wit: "In my opinion the intervenor is not entitled, under the orders heretofore entered in this case, to the relief prayed for, but that the amounts above named, to wit, $25,899.85, $31,310.52, and $8,244.15, should be allowed as general unsecured claims against the Wabash, St. Louis & Pacific Railway Company, with interest from the dates they respectively matured at six per centum per annum;" to which part of the report the intervenor excepts because the same is a wrong conclusion from the evidence adduced, and because under said evidence and the law of the case the intervenor is entitled to the full amount of rent prayed for, together with the penalties provided under said lease for non-payment of said sums on the days respectively when said sums were due.

Wherefore intervenor prays that its said exceptions be allowed, and that said case be referred back to the master for his further action therein, in accordance with the directions of this court, or that this court do now reject the report and recommendations of said master and order the rental accrued under said lease to be paid to the said intervenor, according as it shall to this court seem meet and just.

PATTISON & CRANE,
Att'ys for the Intervenor.

Exceptions to Master's Report Overruled by Master.

On said 20th day of December, 1886, the master refused to allow said exceptions and filed his report as above without modification.

On the 30th day of December, 1886, the following stipula-
309 tions as to exceptions by intervenor was filed, being in words and figures as follows, to wit:

Stipulation as to Exceptions.

CENTRAL TRUST CO. OF N. Y.
vs.
THE WABASH, ST. LOUIS & PACIFIC R'WAY CO. } Consolidated Cause.

In the matter of the intervening petitions of the St. Joseph & St. Louis Railroad Co.

It is agreed & stipulated by and between the parties hereto that the exceptions filed by the intervenor to the report of the master in the intervening petition of said St. Joseph & St. Louis R. R. Co. shall apply and be considered as filed to each and all of the supplemental reports of the master covering said intervening petition and the supplemental intervening petitions of said St. Joseph & St. Louis R. R. Co.

PATTISON & CRANE, *Att'ys for s'd Intervenor.*
H. S. PRIEST, *Att'y for Receivers.*
CENTRAL TRUST CO. OF NEW YORK,
By BUTLER, STILLMAN & HUBBARD &
PHILLIPS & STEWART, *Att'ys.*

On the 19th day of March, 1888, the said circuit court, on hearing of said intervening petitions, the reports of the master thereon, and the several exceptions thereto, overruled said exceptions and entered the following order or decree, to wit:

310 In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY.

Decree in Re Petition of St. Joseph and St. Louis Railroad Company.

MARCH 19, 1888.

Now, on this day, this cause coming on to be heard upon the petition of the St. Joseph and St. Louis Railroad Company, the answer thereto of Solon Humphreys and Thomas E. Tutt, receivers of the Wabash, St. Louis & Pacific Railway Company; the report of E. T. Allen, Esq., special master, and the exceptions taken to said
311 report on the part of the intervenor, and the said exceptions and said cause having been argued by counsel, and the court, having fully considered the same, doth order, adjudge, and decree that each of said exceptions of said intervenor be disallowed and overruled, and the said report is in all things hereby confirmed.

And it is further ordered, adjudged, and decreed that said petition be dismissed, and that the costs of this proceeding be taxed against said petitioner.

(Signed) AMOS M. THAYER, *Judge.*

On said 19th day of March, 1888, at the time of entering said order, the judges of said court delivered the following opinions respectively, to wit:

312 In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants, *vs.* THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.*, Defendants.	Consolidated Cause. Nos. 2357 and 2464. In Equity.

Opinions in Re Intervening Petitions of Theodore Gilman and Charles H. Bull, Trustees; George I. Seney, Trustee, and St. Joseph & St. Louis Railroad Company.

MARCH 19, 1888.

BREWER, *C. J.:*

These are three intervening petitions, in each of which is presented the question of liability for rentals during the receivership. The master denied the petitions, exceptions were duly taken, and the question is now before us on these exceptions.

The first two cases are so nearly alike that the statement
313 of the facts in one will bring the question clearly before us.

In August, 1879, the Quincy, Missouri and Pacific Railroad Company leased its road to the Wabash Railroad Company for a period of ninety-nine years. By subsequent consolidations the Wabash Railway Company became merged into the Wabash, St. Louis and Pacific Railway Company. The latter company, of course, succeeded to all the obligations of the former. The conditions of the lease material to this inquiry were substantially that the lessee would pay taxes and keep the road in repair, and also pay as rental a given percentage of the gross earnings, guaranteeing that such percentage should at all times be equal to the interest at six per cent. on the bonds of the lessor company, issued at the rate of $9,000 per mile. At the beginning of the receivership the outstanding bonds of the lessor amounted to $1,204,000. Gilman and Bull were the trustees in these bonds, and the intervening petition was filed by them, as well as by the Quincy Railway Company.

On the 29th of May, 1884, the Wabash, St. Louis and Pacific Railway Company filed its bill in this court confessing its insolvency and praying the appointment of receivers. This bill showed that the complainant's property was a system made up by the consolidation of various independent lines, some of which were taken in by lease and some by purchase; that nearly all of these independent lines were subject to underlying and prior separate mortgages. It also showed the two general mortgages—one on the system as consolidated and the other on terminal facilities and certain other properties. It averred that the value of these properties consisted largely in the preservation of the system intact, and that to permit the breaking up of the system by separate foreclosures of

these underlying mortgages would largely impair the value of the properties. It made the lessor companies party defendant. It prayed, among other things—

314 "That after paying such claims as were required to be paid in order to prevent a forfeiture of orator's rights and interests in all rolling stock and equipments the residue or surplus of all incomes, revenues, and earnings of said railroads and all other assets coming into their hands as such receivers be applied to the discharge of all debts, obligations, and liabilities of orator, according to the rights and legal and equitable priorities of all concerned as creditors or otherwise, under the direction of the court."

The order appointing the receivers directed them to take possession of all these lines of road merged in this one system, and also as follows:

"It is further ordered that the said receivers, out of the income that shall come into their hands from the operation of said railroad or otherwise, proceed to pay all balances due or to become due to other railroads or transportation companies on balances growing out of the exchange of traffic, accruing during six months prior hereto.

That said receivers also in like manner pay all rentals accrued or which may hereafter accrue upon all leased lines of said complainant, and for the use of all terminals or track facilities, and all such rentals or installments as may fall due from said complainant for the use of any portion of road or roads or terminal facilities of any other company or companies, and also for all rentals due or to become due upon rolling stock heretofore sold to complainant and partially paid for.

That said receivers also pay in like manner, out of any incomes or other available revenues which may come into their hands, all just claims and accounts for labor, supplies, professional services, salaries of officers and employés, that had been earned or have matured within six months before the making of this order.

It is further ordered that said receivers pay all current ex-

315 penses in the operation of said road, collect all the revenues thereof, and all choses in action, accounts, and credits due and to become due to the company.

That such receivers keep such accounts as may be necessary to show the source from which all such income shall be derived, with reference to the interest of all parties herein and the expenditures by them made."

In pursuance of this order the receivers took possession of the Quincy road with the other properties. On the 26th of June, 1884, the receivers filed their petition in the court, asking its instructions as to how they should dispose of the earnings of certain lines, among them the Quincy road, which lines they believed did not earn enough to pay operating expenses and rental; and on the 28th of June an order was entered as follows:

"3d. It is further ordered that the receivers herein, until otherwise directed, keep the accounts of all the earnings and incomes from, as well as the accounts of all the operating expenses, costs of

maintenance, and taxes upon the following lines or divisions of said property separately, to wit."

On the 15th of October, 1884, upon the report of the master recommending that the receivers be directed to pay interest on a certain division, the court in granting the order made this announcement:

"The COURT: I stated at an early day, and Judge Brewer has gone over that matter (and we are in accord with regard to it), that I am not going to take the money that belongs to the underlying mortgages to pay interest on non-earning branches. If they have got to fail they must fail. I will protect the underlying mortgages especially, and they haven't got enough here to do it.

Mr. SMITH: Then I ask that the matter be referred to the master, and we will introduce testimony showing the actual earnings of the road in the past three months.

316 The COURT: That is the important element. If this branch is earning enough to pay its own interest, that is another inquiry; but certainly I am not going to sit here and order that the earnings that belong to other branches in this consolidated system shall be taken to pay concerns that do not pay earning expenses. Let them collapse."

And on April 16th, 1885, after receiving the reports of the receivers in respect to several lines, the Quincy road among them, and after notice to the various parties in interest, an order was entered to this effect:

"1st. That the subdivisional accounts must be kept separately. 'That was an order,' said the court, 'passed by Brother Treat at the very outset of this receivership, in order that the particular equities of each one of these divisions, as between themselves, might be ascertained.'

"2d. Where any subdivision earns a surplus over expenses the rental or subdivisional interest will be paid to the extent of the surplus, and only to the extent of the surplus.

"3d. Where a subdivision earns no surplus, simply pays operating expenses, no rent or subdivisional interest will be paid. If the lessor or the subdivisional mortgagee desires possession or foreclosure he may proceed at once to assert his rights; while the court will continue to operate such subdivision until some application be made, yet the right of a lessor or mortgagee, whose rent or interest is unpaid, to insist upon possession or foreclosure will be promptly recognized.

"4th. Where a subdivision not only earns no surplus, but fails to pay operating expenses, as in the St. Joseph and St. Louis Branch, the operation of the subdivision will be continued, but the extent of the operation will be reduced with an unsparing though a discriminating hand."

And on July 15th, 1885, the court, on the application of the
317 trustees, Gilman & Ball, made an order directing the receivers to surrender the Quincy road to them, which was done. As a matter of fact, the earnings of the Quincy road during time it was

in the hands of the receivers were insufficient to pay the operating expenses; and at the time the receivers took possession of the property there was due by the company of floating debts, which by the rulings of the supreme court were preferential debts and entitled to payment prior to the mortgages, over three millions of dollars. The gross receipts of the entire system during the receivership were insufficient to pay the operating expenses and discharge all of this floating and preferential indebtedness, and the purchasers, in addition to the sum bid by them, have, as required by the orders of this court, paid the balance of said preferential and floating indebtedness. The purchasers have taken possession of the property within the jurisdiction of this court, though it is true the court, in the order surrendering possession, reserved the right to retake it if the purchasers failed to pay all claims and demands which should be adjudged prior in lien to the mortgages. The intervenors' claim, of course, is that the rentals due them are preferential debts and should be paid prior to the mortgages. I believe these facts present the question fully.

We start with this fact, that prior to the appointment of the receivers intervenors' claim was subordinate to that of the mortgagees. It was a claim, of course, good against the income, but not against the corpus; at least not good against the corpus until after the payment of the mortgages; and the first question is, whether the action of the receivers in taking possession or of the court in ordering possession changed the status and gives to intervenors' claim a higher position than it theretofore had. It is strenuously insisted by intervenors that it did, and they say that by taking possession of this leased property the receivers became virtually the assignees
318 of the lease, and therefore bound by its terms, and bound to an extent which binds the property in preference to the lien of the mortgagees. A multitude of citations are made from the text books and decided cases to the effect that where a mortgagee institutes foreclosure proceedings and upon his application a receiver is appointed and such receiver takes possession of property leased by the mortgagor, such taking of possession is an acceptance of the lease and binds the receiver as assignee, and binds so as to concede a preference to the lessor in respect to his rental. In other words; if A, a mortgagee, commences foreclosure proceedings against B, a mortgagor, and a receiver, appointed at his instance, takes possession of the property of C, leased by B, such possession of the leased property is an acceptance by the receiver of the lease, makes him an assignee of the lessee, and binds both him and A, the mortgagee, to the full amount of the mortgaged property, to the payment of the rents.

High thus states the rule:

"As a rule, receivers are not liable upon the covenants of the persons over whose effects they are appointed, but become liable solely by reason of their own acts; and receivers who have been appointed over a corporation and who have accepted the trust and taken possession of the assets do not thereby become liable for rent of the premises held by the company under a lease.

"Nor can they be held liable until they elect to take possession of the premises or until the doing of some act which would in law be equivalent to such an election; but when a receiver enters upon and occupies premises which had been leased to a corporation over which he is appointed, he thereby becomes liable for the rent due under the lease, the liability in such cases being the common-law liability of an assignee of a lease, and not for the debt due
319 from the corporation; and in such case, the facts being undisputed, it is proper for the court to direct the receiver to make payment to the lessor without a reference to determine the *the* matter."

High on Receivers (2d ed.), sec. 273.

This proposition, fortified as it is by ample citations, is conceded, but is it applicable? This receivership was upon the application of the mortgagor—a party in possession of various properties, some owned, some leased, and all subject to various obligations. Could the action of the mortgagor or the decision of the court upon his application change the relative rights of the mortgagee and the lessor? Was it in the power of the court upon the application of the mortgagor alone to charge the mortgagee with obligations to which he never assented?

That this bill was filed by the mortgagor is, of course, conceded, and that its theory was not the preservation of any single creditor's rights but that of all its creditors, secured and unsecured, is evident from these extracts from the bill:

"That all, or nearly all, of said mortgages embraced all rolling stock to be thereafter acquired by the companies executing such mortgages, but that as such original companies and those lines of railroad have been gradually absorbed in orator's vast system the rolling stock on said entire system has become so intermingled as to be incapable of division according to the original ownership of the said several lines of road, according to said several mortgages; and any attempt to control or dispose of portions of such rolling stock by any court or courts not having jurisdiction of the whole and not competent to deal with orator's entire property as a unit would produce great confusion and uncertainty, and would result to great loss to all persons interested in said rolling stock or in orator's property or securities. * * * And orator avers that the in-
320 terest of the orator in said road and of all its creditors and holders of the bonds aforesaid are greatly imperiled by the existing prospect of the disruption of said road on the happening of the default impending as aforesaid, and the interests of all parties can only be protected by the interposition of a court of chancery; that if said lines of railroad are broken up, as aforesaid, and the fragments thereof placed in the hands of various receivers, and the rolling stock, materials, and supplies seized and scattered abroad in the manner above indicated, the result will produce irreparable injury and damage, not merely to orator, but to all persons having any interest in said lines of road and the securities thereof."

The idea which underlies this bill is that which underlies the

action of a voluntary bankrupt under the bankrupt law. Finding himself insolvent, he surrenders his property to the court to be disposed of for the benefit of his various creditors. Such action in no manner changes the relative rights of his various creditors. They stand subsequent to this action as they did before, and their various rights and equities are determined not by his action in surrendering his property to the custody of the court, but by the terms and obligations of the contracts theretofore entered into. Narrow the question in this way: Suppose A is the owner of a mill and the lessee of an adjacent farm; having mortgaged both his mill and his leasehold interest and finding himself insolvent, he applies to the court by bill for the appointment of a receiver to take possession of his property and dispose of it for the benefit of his creditors, can it be that his action in filing the bill or the action of the court in appointing a receiver makes the claim for rental an unsecured obligation paramount to the secured lien of the mortgage? The proposition will be startling if true. It would put it in the power of a mortgagor to dispossess the vested lien of the mortgagee and
321 render such lien subordinate to unsecured claims. It is true that after the appointment of a receiver the mortgagee came in with an application for a foreclosure; but the assertion of his rights to a foreclosure was not different from that of the assertion of the lessor to his claim for rent. Each took what rights were given him by his prior contract, and neither by his action waived any of his rights or consented to a subordination of his priority. It is true also that the holder of the general mortgage prayed the court to extend the receivership over a part of the property to it as a mortgagee. Perhaps if that application had been granted some different question might now arise; but the court expressly decided against the application, leaving the receivership to stand as it was in the first instance—one granted on the application of the mortgagor, and one whose appointment, it was believed, would in no manner change the relative rights of any creditor. It may be said that the theory of the bill was novel; that seldom it is the mortgagor, the debtor, applies for a receivership. This may be true, though this is not the first instance in the judicial history of this country that such an application has been made and sustained. The New York and New England road was upon a like application placed by the circuit court of Connecticut in the hands of a receiver, and in bankrupt cases, though that was specially authorized by statute, such a proceeding was common. But the question is not now upon the propriety of the action of the court in appointing a receiver on the application of the mortgagor, but upon the effect of such action. The propriety of this proceeding was long since challenged in this court, and its opinion, with the concurrence of both judges, was in favor of its propriety and validity. That question being settled, it would seem to be logical and necessary that no action of the court at the instance of the mortgagor, no action of the receivers in direct obedience to the orders of the court, could change the relative rights of the creditors *inter sese*.

322 Again, if the action of the court in making the appointment and of the receivers in taking possession did not of itself create a new and legal obligation against the mortgagees, are there any equitable reasons why the claim of the lessor should be given priority to that of the mortgagee? The lessor was defendant as well as the mortgagee; each knew his rights; each summoned into court was at liberty to assert his rights; neither was told directly or by implication that he would gain aught by the action of the court in making the appointment. As the mortgagee might come in, and did come in, asking foreclosure of his mortgage, so the lessor might come in, and many did, demanding the surrender of the leased property for non-payment of rent. These very intervenors after the lapse of some months came in and asked possession of their property, which was promptly surrendered. Why should the mortgagee be compelled to pay the lessor any more than the lessor be compelled to pay the mortgagee? Each was summoned into court; each was called upon to make a showing of its claim, and each did so in time and manner that suited it. Because there were various properties covered by separate mortgages all merged in one system and as such covered by one subordinate mortgage, is there any equitable reason why the court, seizing upon all the properties at the instance of the common debtor, can be said to have created any new and different equities between these various creditors? Did not each stand upon his legal rights, rights as they existed before the receivership and rights which could be asserted at any time, and were in fact asserted as soon as each party saw fit? There was certainly nothing in the action of the court or the various orders made by it which gave to any party the right to expect other than his legal claims. Of course, the order, in the first instance, was to pay rentals out of the income, and that income, as we have seen, is all exhausted in preferential debts and operating expenses.

323 Early in the history of receivership the order of the court was to keep separate accounts of the earnings of the different lines, and the clear intimation of all the orders and opinions as well as the express language of many was that the income from any property, part of the general system, would be appropriated to the specific claims upon that property. It is undoubtedly true in railroad foreclosures that by the decisions of the supreme court certain claims have been adjudged preferential and superior to mortgage and secured liens. So far as these rulings have been made this court has unhesitatingly followed them; but it cannot be that the security of a mortgage deed, even if it be a railroad mortgage, is open to displacement by every unsecured creditor. Only the cogent public reasons, which have been so carefully considered and well stated by the supreme court, justify any postponement of the priority of a mortgage debt. So far as I am individually concerned, I am unwilling to go a step beyond the matters and rules laid down by the supreme court. As to all outside of those matters I believe the sacredness of mortgage obligations should be observed, and that secured debts should be given the priority which the contracting parties awarded to them. In that view the claims of the intervenors

in respect to the Quincy road and the St. Joseph and St. Louis road are without foundation and the exceptions to the master's reports will be overruled.

With respect to the claim of George I. Seney, the trustee in the mortgage upon the Clarinda Branch, a somewhat different state of facts existed.

On June 28th, 1884, upon the petition of the receivers and the representations by them that the Clarinda Branch was important to the system and had earned more than operating expenses, the master recommended an order, which was duly entered by the court, as follows:

"It is ordered that until otherwise directed the receivers herein, from the incoming rents and profits of said property after
324 meeting such other obligations as they have been directed to discharge by the former orders of this court, pay as the same shall from time to time mature, from whatever balance may remain in their hands, * * * on the first days of February and August (or as soon thereafter as practicable) the semi-annual interest at six per cent. per annum, then due on two hundred and sixty-four (264) bonds of one thousand dollars each, issued in July, 1879, and secured by mortgage on the Clarinda and St. Louis railroad (otherwise known as the Clarinda Branch), amounting to $7,920."

The intervenor, though made a party defendant, entered his appearance and first became a party to the proceeding on Jan. 4, 1885. He was notified by the receivers of an application for a new order in respect to the Clarinda Branch, which was entered upon April 16th. The rental was in fact paid to August 1, 1884. Now, the rental from August 1, 1884, to April 16, 1885, stands, we think, upon a different footing. There was an express order of the court in reference to that branch and couched in such language that the intervenor had a right to rely upon it and expect the payment of his rent until some other order was made. Wherever a specific order is entered after showing and petition by the receivers it would seem as though the party stood upon a different footing and was not called upon to assert his rights as lessor to the surrender of the leased property. Whatever might have been the reasons, and however much mistaken the receivers may have been, they acted upon their best judgment, and the court seems by that order to have given express assurance to the intervenor that the interest of the system required the payment of that rental and the preservation of that property in the system, so that the order will be that the exceptions to the report of the master will be partially sustained and the receivers directed to pay the rental for the time specified, with
325 interest. So far as the subsequent rental is concerned, there is nothing to distinguish this case from the other two heretofore considered, and the report of the master will be sustained. It is unnecessary to add more. We have had these matters under consideration for some months, and have given to them the most careful consideration. The arguments and briefs of counsel have been most full and elaborate and the questions presented not easy of solu-

tion. The amounts in each case are so large that, if our conclusion is erroneous, a review may be had by the supreme court.

THAYER, *D. J.:*

I shall only add a few words to what has already been said. We are asked by the intervenors to make an order in this matter the practical effect of which will be to give an unsecured claim priority over a mortgage debt. As there are no funds at our disposal derived from the income of the property lately in the hands of the receiver, if we allow the claims in the desired form we must enforce payment out of the mortgaged property by retaking it unless the purchasers under the mortgage see fit to discharge the lien which we impose.

It is proper, therefore, that we should consider carefully both the legal and equitable grounds upon which such action can be predicated and justified.

No lawyer would for a moment doubt that an assignee in bankruptcy would be liable for rent if he took possession of leasehold premises held by the bankrupt and used them for the purpose of administering on the assets in his hands.

In that event the assignee would become personally bound
326 by the covenants of the lease so long as he remained in possession, and the court would be bound to protect him against the covenant to pay rent by allowing him for all rent, disbursements as an expense of administration. (*In re* Merrifield, Third National Bankruptcy Register, p. 98, and People *vs.* Insurance Company, 30 Hun., 142.)

The same principle holds good, of course, in its application to public liquidators under the English winding-up acts, and receivers of copartnership estates, and the like.

In re Oaks, Pitts, Colliery Company (L. R., Vol. 21, Chancery Division, 330; *In re* Lundy Granite Company, Sixth Chancery App., 462, and Commonwealth *vs.* Insurance Company, 115 Mass., 278). If such officers use property held under lease for the purpose of advantageously administering on property committed to their charge, they must pay rent as stipulated in the lease, and the amount paid is an expense of administration, is chargeable against the fund undergoing administration.

The rule as applied in such cases has never operated, however, so far as we can find, to disturb the priority or claims—that is to say, so as to give an unsecured debt a preference over one that is secured.

It is also well settled that if mortgagees, in a proceeding to foreclose a mortgage, procure the appointment of receivers and cause them to take possession of property held under lease by the mortgagor, to which their mortgage does not extend, they thereby bind the mortgaged property for the payment of rent that accrues so long as the receiver remains in possession.

Such was the rule applied in the case of Woodruff *vs.* The Erie Railroad Company (93 N. Y., 609); Miltenberger *vs.* Railroad Company (106 U. S., 286).

The principle which underlies all of the cases cited appears
327 to be substantially the same—that is to say, if an assignee in bankruptcy, public liquidators, receivers of insolvent corporations, or receivers appointed under proceedings to foreclose mortgages, take possession of the property of a third party, held under a lease, and use it ostensibly for the purpose of administering advantageously on the assets in their hands, or at the instance of and for the benefit of mortgagees, full rent must be paid for the use of such property out of any funds within the control of the court, and that without reference to the question whether the use of the leased premises proves to be beneficial or otherwise.

There is, in fact, no difficulty in deciding what the law is. The difficulty lies in making a correct application of it to the particular case under consideration, or rather it lies in determining whether the present proceeding was of such an exceptional character that the principle invoked to establish the liability in question is applicable.

Attention has already been called to the fact that the bill in this case was filed by the mortgagor against all persons and corporations, including the lessors, who were interested in the various roads forming the complainant's railroad system.

As I understand the bill of complaint, the complainant professed to be acting not alone in the interest of mortgagees, but in the interest of all the corporations whose roads had become an integral part of the system, whether by lease, consolidation, or otherwise.

It was substantially represented by the bill that the affairs of the complainant had become so complicated by the various mortgages that had been executed, the consolidations that had taken place, and the leases made or assumed, and by the admixture of rolling stock, that the best interests of all parties concerned demanded the
328 appointment of receivers over the whole system as the only feasible method of working out the equities appertaining to each.

It was on account of such representations that the receivers were appointed and ordered to take possession of the whole system. In other words, the receivership was not created for the benefit or protection of any one interest or class of interests, but for the benefit of all parties to the suit who were in anywise interested in the system. The lessor companies, whose roads went into possession of the receiver, were advised of such facts by the form of the bill and by the prayer for relief. They were at liberty at any time after it was filed to show that the extension of the receivership over the leased lines was not necessary to the protection of any interests of the lessor companies, or that it was detrimental to such interests. If such showing had been made (and it appears to me that the lessor companies were cited into court to confess or deny the averments of the bill in that behalf), the leased lines would unquestionably have been released at any stage of the proceeding.

Intimations to that effect and of the theory on which the court was proceeding appear to have been given during the progress of the case from time to time. But, so long as the lessor companies

acquiesced in the averments contained in the bill and on the faith of which receivers were appointed, it appears to me that the receivership continued to stand for their protection and for the protection of the interests of all persons and corporations who were parties to the proceeding, and that so long as that state of affairs existed the relative rights of the parties were not changed, and that the mere possession by the receiver of the leased lines did not have the effect of making the rentals a charge on the body of the mortgaged property superior in rank to the mortgage debt. The case, as I conceive, bears some analogy to the case of the Bridge Water
329 Engineering Co. (12 Chancery Division, 181), where, inasmuch as a public liquidator had retained possession of rented premises for the mixed accommodation or benefit of the landlord and the liquidator, the chancellor refused to allow the rents as a part of the cost of administration.

The question before us should not be determined, in my opinion, with any reference to the question whether it was in fact necessary for the protection of the interests of the lessor companies to extend the receivership over the leased lines, although if we were at liberty to consider that matter it seems probable, in view of the condition of one of the leased roads, that if it had not been taken in hand by the receivers it would have suspended operations for a time at least and put the public to great loss and inconvenience, even if it had not incurred a forfeiture of its franchises.

But, be this as it may, the question is not to be determined by considering whether the representations of the bill were erroneous in so far as the leased lines were concerned. We must consider what the bill did in fact allege; upon what theory it was drawn, and for what purpose the court appointed receivers and for whose benefit, and whether in the light of such facts and the subsequent acquiescence of the lessor companies they can now legally or equitably insist that because the receivers took possession of their road under an order of court the rentals which accrued during the period of such possession must perforce take precedence over the mortgage debts, although such leased lines during the period in question did not pay operating expenses.

In my opinion, this question must be answered in the negative. The case is so exceptional in its character that the principle invoked to establish the liability in question, in my judgment, is not applicable.

330 In the course of the argument something was said about the receivers having exercised an election to take possession of the leased lines. On the one hand it was argued that as they elected to take possession they became personally bound as assignees of the lease by all its covenants. On the other hand, it was urged that they acted under the orders of the court and exercised no election or discretion.

It appears to me that the receivers did not elect to take the leased lines in the sense in which that term is used in the books, but at the same time I do not regard the question as to whether their action was voluntary or enforced as at all material. They had pos-

session of the leased lines and operated them. If the court ordered them to take possession of the same for the benefit of any particular interest or class of interests involved, and without any reference to the protection of the rights of the lessor companies themselves, then those interests for whose advantage the leased lines were taken and operated by the receivers should stand the expense of the rental, and the court would be bound to so order. The court has no more right than an individual to use one person's property for the exclusive benefit of another without paying for its use.

But from the record and proceedings in this case it does not appear to me that any property was so taken and used. The entire system was taken in hand at the instance of the general owner to protect the interests of all parties concerned. The court, through its receivers, at all times adopted that line of policy which seemed to be conducive to the best interests of all parties as then foreseen. Among other things done for the protection of all parties to the litigation, at an early day it made an order to prevent the earnings of the numerous roads composing the system from becoming confused. It appears to me that such order, so far as it related to the leased lines, was a most explicit avowal that the court did not re-
331 gard the rentals that from time to time accrued as an expense of administration, and that it did not regard the receivership as having been created for the benefit of the mortgagees or any particular class of creditors, but for the mutual advantage of all parties concerned, the lessor companies included.

In conclusion, I will add that in any light in which I have been able to view the question it appears to me that the report of the master should be confirmed in the respects indicated in the main decision, and I accordingly concur in the order already announced.

And afterwards, on the 21st day of May, A. D. 1888, there was entered in said cause a modified decree in words and figures following, to wit:

332 In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

CENTRAL TRUST COMPANY OF NEW YORK *et al.* *vs.* WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.* — Consolidated Cause. Nos. 2357 and 2464.

Modified Decree in Re Petitions of St. Joseph & St. Louis Railroad Company.

MAY 21, 1888.

It is ordered that the order of this court made on the 19th day of March, 1888, be modified, and that the following order be now entered in place and in modification thereof:

Now, on this day, this cause coming on to be heard upon the

333 amended petition and several supplemental petitions of the St. Joseph and St. Louis Railroad Company, heretofore filed, asking for the payment of rentals; the answers thereto of Solon Humphreys and Thomas E. Tutt, receivers of the Wabash, St. Louis and Pacific Railway Company; the several reports thereon of E. T. Allen, Esq., special master, and the exceptions taken to said reports on the part of the intervenor, and also upon the petition of said railroad company, filed November 21st, 1885, under the order of November 9th, 1885, and the report of the master thereon and the exceptions thereto, and also upon the amended application of said St. Joseph and St. Louis railroad, filed September 22nd, 1886, that said rentals be paid out of proceeds of the foreclosure sale or by the purchasers at said sale, and the plea of the receivers thereto, and the court, having fully considered the same, doth order, adjudge, and decree that each of the exceptions of said intervenor to said several reports be disallowed and overruled, and the said reports are in all things confirmed; and it is further ordered, adjudged, and decreed that the said petition and the several supplemental petitions be dismissed, and that the costs therein down to the time of filing exceptions to the master's reports be taxed against the receivers and subsequent to that time against petitioner.

And it is further ordered, adjudged, and decreed that the petition filed November 21st, 1885, be denied, and that it be dismissed and the costs thereof taxed against the petitioner.

And it is further ordered that the amended application or petition filed September 22nd, 1886, be denied and the same dismissed, and that the costs thereof be taxed against petitioner.

(Signed) AMOS M. THAYER, *Judge.*

334 And afterwards, to wit, on the sixth day of September, A. D. 1888, the following further proceedings were had in said cause, to wit:

CENTRAL TRUST CO. OF N. Y. *et al.*, Complainants, *vs.* WABASH, ST. LOUIS & PACIFIC R'Y CO. *et al.*, Defendants.	2357 & 2464, Consolidated.

In re intervening petitions of the St. Joseph & St. Louis R. R. Co.

Appeal Allowed.

Now comes the intervenor, by its solicitor, E. W. Pattison, Esq., and prays an appeal from the decree of this court herein to the Supreme Court of the United States, which is allowed.

Appeal Bond Approved.

And thereupon said intervenor presents its appeal bond in the sum of five hundred dollars, which is approved by the court and ordered to be filed herein and made part of the record in this cause.

Said appeal bond is in words and figures following, to wit:

335 Know all men by these presents that we, St. Joseph and St. Louis Railroad Company, as principal, and Samuel N. Wacker and John Cockran, sureties, are held and firmly bound unto Solon Humphreys and Thomas E. Tutt, receivers of the Wabash, St. Louis and Pacific Railway Co., in the full and just sum of five hundred —, to be paid to the said Solon Humphreys and Thomas E. Tutt, receivers as aforesaid, heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this first day of September, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at the March term, 1888, of the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, in a suit depending in said court between the said St. Joseph and St. Louis Railroad Company, as intervening petitioner in consolidated cause Nos. 2357 and 2464, in equity, wherein The Central Trust Company of New York and James Cheney, as trustees, are plaintiffs and The Wabash, St. Louis and Pacific Railway Company *et al.* are defendants, a final decree was rendered against the said St. Joseph & St. Louis Railroad Company and in favor of the obligees herein, and the said St. Joseph and St. Louis Railroad Company having obtained an appeal of the said court to reverse the said final decree in the aforesaid suit, which said appeal was prayed in open court, on the — day of ——, 1888, to the Supreme Court of the United States, at a term thereof to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said St. Joseph and St. Louis Railroad Company shall prosecute said appeal to effect and answer all damages and costs if it fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

ST. JOSEPH & ST. LOUIS RAILROAD COMPANY, [SEAL.]
By WINSLOW JUDSON. [SEAL.]
SAMUEL N. WACKER. [SEAL.]
JOHN COCKRAN. [SEAL.]

Approved by—
AMOS M. THAYER, *Dist. Judge.*

Sept. 6th, 1888.

336 [Endorsed:] Nos. 2357 and 2464. United States circuit court, eastern division of the eastern judicial district of Missouri. *In re* intervening petition of St. Jos. & St. L. R. R. Co. in the consolidated cause Central Trust Co. of N. Y. *et al. vs.* Wabash, St. Louis & Pac. R'way Co. *et al.* Bond, $500. —— ——, principal. —— ——, sureties. Filed 6th day of Sept., 1888. A. P. Selby, clerk.

337 On the 27th day of May, 1884, The Wabash, St. Louis and Pacific Railway Company, respondent in said consolidated cause, filed in said circuit court its bill of complaint against said The Central Trust Company of New York and others; which said bill is in words and figures as follows, to wit:

In the Circuit Court of the United States for the Eastern District of Missouri, of the March Term, A. D. 1884.

To the honorable the judges of the circuit court aforesaid, in chancery sitting:

Humbly complaining to your honors, your orator, The Wabash, St. Louis & Pacific Railway Company, would respectfully represent that your orator is a body politic and corporate, organized and existing under and by virtue of the laws of the State of Missouri, and is a citizen and resident of said State.

That your orator owns a number of lines of railroads extending across the States of Missouri, Illinois, and Indiana, and also into the States of Ohio, Michigan, and Iowa, with branches extending in various directions within said States.

That orator was created a body corporate by the consolidation of certain other corporations organized and existing under the laws of the States of Missouri, Illinois, Indiana, and Ohio and owning and operating lines of railroad in said States.

That portions of the said lines so owned by your orator lie within the eastern district of Missouri, and your orator's principal office and the headquarters of its management are located in the city of St. Louis, in said district.

Further complaining, your orator further shows unto your honors that your orator is also the lessee of certain other lines of rail-
338 roads located within the said several States, and your orator has operated all of said lines as a unit until recently, when said lines were leased by the orator to the St. Louis, Iron Mountain & Southern Railway Company, a corporation existing under and by virtue of the laws of the State of Missouri, and that said last-named company now operates all of said lines of railroad as the lessee of orator.

That by the terms of said lease said St. Louis, Iron Mountain & Southern Railway Company was required to pay, as rental of said lines, all the net earnings thereof to orator or on account of orator, but was not bound to pay or advance to or on account of orator any sum or sums in excess of such net earnings; all of which will more fully appear by reference to such contract of lease, made on exhibit, as hereinafter set forth.

Your orator further shows that several lines of railroad owned by orator, as distinguished from its leased lines, were acquired in part by consolidation and in part by purchase, and that while said lines were owned by other corporations prior to the acquisition of title thereto by orator each of said lines was incumbered by one or more mortgages or deeds of trust issued and executed by the companies owning the said lines prior to orator and intended to secure

the payment of the bonded indebtedness of such companies, and that large numbers and amounts of such bonds so secured by liens on said portions of orator's lines are now outstanding and unpaid; and because said mortgages or deeds of trust are very numerous your orator files, as part of this bill of complaint, a list thereof, showing the dates of said several instruments, the trustees named therein, the amounts secured thereby, the rates of interest and times when interest and principal mature upon the same, the several companies by which said mortgages and bonds were issued, and the lines covered by each of said mortgages or deeds of trust, and also the
339 amounts now unpaid thereon severally; and orator marks said list Exhibit A and prays that the same be taken as a part hereof.

And orator also embraces in said Exhibit A a statement of interest obligations assumed by orator and secured by mortgages or deeds of trust on its leased lines, the payment of such interest being conditions on which orator obtained such lines; and orator also files as parts of said Exhibit A copies of all such mortgages, deeds of trust, and leases as are necessary to the purpose of this bill (and which are not herein made distinct exhibits by themselves), so far as such copies are obtainable in time to be filed herewith, the original and record copies of some of said instruments not being within reach of orator within the time left to orator under the circumstances which require the prompt filing of the bill of complaint, but orator will, as soon as possible, file copies of all such instruments so far as necessary, and prays that when filed the same be taken as parts hereof, and orator marks all such copies of instruments as are filed herewith and are not made distinct exhibits by themselves sub-Exhibits A, and numbers the same consecutively for easy identification.

And orator further shows that after your orator had acquired title to the greater portion of the lines of railroad aforesaid, to wit, on the first day of June, 1880, your orator executed to the Central Trust Company of New York, a corporation existing under the laws of the State of New York, and which then was and is still *is* a citizen and resident of said last-named State, and to James Cheney, who then was and still is a citizen and resident of the State of Indiana, as trustees, a certain mortgage or deed of trust, to which orator prays leave to refer as the "general mortgage." The said general mortgage was intended to secure an issue by orator for the purposes therein expressed of bonds to the amount of fifty million dol-
340 lars, payable in gold coin on the first day of June, A. D. 1920, with interest at the rate of six per cent. per annum, payable on the first days of June and December of each year; and orator files herewith a true copy of said general mortgage, marked Exhibit B, and prays that the same, together with the certificates attached thereto and the copy of bonds embraced therein, be taken as part of this bill as fully as if incorporated in the body thereof.

Further complaining, your orator also showeth that said general mortgage embraced all the lines of railroad then owned by orator, and also all its interest in all other lines and property then owned

or thereafter to be acquired, and also all rents, issues, and profits derived by orator from said lines of road, and all leasehold interests then owned or thereafter to be acquired by orator.

And said mortgage further embraced all credits and choses in action accruing to orator and all the franchises of orator, but said mortgage or deed of trust so placed upon said property was, by the terms thereof, expressly made subject and inferior to all such prior liens as were charged upon the several portions of said road and the equipments thereof, and to the estate and lien of such specific trust and mortgages and other obligations as might thereafter be made and charged upon any property which might thereafter be acquired by orator, and which trust so charged should form part of the purchase-money or conditions of the acquisition of such after-acquired property by your orator.

Your orator shows that under the terms of said mortgage bonds were issued, negotiated, and sold for value by orator to the amounts stated in said Exhibit A, and that interest is accruing and will fall due thereon, as shown by said exhibit.

Your orator further states that said general mortgage was
341 duly executed, acknowledged, and recorded as required by law, and that the bonds so issued as aforesaid were duly certified by the trustees named in said mortgage according to the terms and conditions thereof.

Further complaining, your orator showeth that on the 10th day of April, A. D. 1883, your orator executed and delivered to the St. Louis, Iron Mountain & Southern Railway Company aforesaid an indenture of lease whereby orator leased to said last-mentioned company all its lines of railroad, whether owned or leased by orator, upon the terms and conditions set forth in the said indenture, and said lessee company has, since the execution of said instrument, operated said several lines of railroad, and still continues so to do, as the lessee of your orator; and orator files herewith a true copy of said indenture of lease, marked Exhibit C, and prays that the same be taken as a part of this bill of complaint as fully as if incorporated into the body of it; and your orator refers to the copy so filed as Exhibit C as showing the terms and conditions upon which the lines of railroad of orator were so leased to said St. Louis, Iron Mountain & Southern Railway Company.

And orator, further complaining, also showeth to your honors that, being greatly in need of money wherewith to meet accruing interest and to place its lines of road in good condition, and to obtain and pay for a large amount of rolling stock and other necessary equipment, and to complete certain of said lines then being constructed, orator, on 1st day of May, 1883, entered into a certain other indenture with the Mercantile Trust Company of New York, a corporation organized and existing under the laws of the State of New York and a citizen and resident of said last-named State; that orator was named in said indenture as the party of the first part and the said Mercantile Trust Company of New York as party of the second part, and said St. Louis, Iron Mountain & Southern

Railway Company was named therein as party of the third
342 part; and orator files herewith a true copy of said last-named indenture, marked Exhibit D, and prays that the same be taken as a part of this bill of complaint; that by the terms of said indenture orator assigned and conveyed to said Mercantile Trust Company, in trust for the purposes therein mentioned, a large number of engines and cars, and also a large number of bonds, stocks, and certificates, and also certain equitable interests of orator in certain valuable depots, grounds, and terminal facilities in the city of Chicago, Illinois, held in trust for orator by Solon Humphreys and John P. Garrett, and also certain like interests and facilities in the city of Detroit, Indiana; Peoria, Illinois, and Des Moines, Iowa.

That said last-mentioned indenture was so executed for the purpose of securing a number of bonds to be issued by orator, amounting to ten millions of dollars, payable in twenty years from date, with interest at the rate of six per cent. per annum, payable semi-annually on the 1st days of May and November of each year.

And orator further showeth that bonds secured by said indenture were issued and sold or pledged for value by orator to the amount shown by said Exhibit A, and that the amount thereof so outstanding and the interest accrued and accruing thereon are also shown by said exhibit; and orator begs leave to refer to the said indenture so marked Exhibit D as the "collateral trust."

And orator would further show that afterwards, to wit, on the 21st day of December, 1883, orator, as party of the first part, entered into a certain other indenture, bearing said date, in which said indenture the said St. Louis, Iron Mountain & Southern Railway Company was party of the second part, by which instrument orator, for the purposes therein expressed, mortgaged to said last-named company all its lines of railway and all its property, choses in action, income, rents, and profits; and orator files herewith copy of
343 said last-mentioned indenture, marked Exhibit "E," and prays that the same may be taken as a part of this bill of complaint; and orator further shows that said last-mentioned mortgage was duly recorded, but was and is subject to certain prior mortgages herein referred to.

That said last-mentioned mortgage was intended to secure said St. Louis, Iron Mountain & Southern Railway Company as to any advances made or to be made to orator under the provisions of said indenture of lease.

Further complaining, your orator shows unto your honors that for several successive years your orator has been compelled to spend vast sums of money in repairing injuries inflicted upon the lines of your orator by repeated and extreme freshets; that during the last two years the said freshets and high waters have been so extreme that in many places your orator's tracks, embankments, bridges, and culverts were wholly swept away for long distances, and that in one instance the bridge of your orator known as the St. Charles bridge was so far injured and so nearly destroyed that your

orator was compelled to expend several hundreds of thousands of dollars in replacing the same.

That during the last two years a partial failure of crops has occurred in large sections of the country occupied by orator's lines, and particularly in those fertile portions of said country from which orator fairly and reasonably expected to derive very large revenues during said time, but that during said two years orator's revenues, from the causes aforesaid, have been greatly diminished, and at the same time orator's expenses have been largely increased by the unusual recurrence of the extreme freshets, as herein already stated.

That in order to meet the expenses of maintenance and operation of its road, and to repair the ravages occasioned by said freshets, and to complete portions of its said lines in course of construc-
344 tion, and to put the same in operation your orator has been compelled to borrow large sums of money, the amounts of which will be hereafter stated.

That a considerable portion of said money was advanced by the St. Louis, Iron Mountain & Southern Railway Company to orator, but that under the terms of the lease aforesaid made between orator and said last-mentioned company the said St. Louis, Iron Mountain & Southern Railway Company is not required to make further advances, and has notified orator that it does not intend to advance any more money to orator.

That your orator also issued, within the last two years, its promissory notes for very large sums of money, and in order to provide means for the meeting of its expenses and the keeping of its road in successful operation and completing its lines as aforesaid orator induced a number of persons of high financial standing to become indorsers of said notes, and by means of a credit given by such indorsements orator was enabled to negotiate said notes for value and received the proceeds thereof; and orator shows unto your honors that there will be due on said promissory notes at maturity about the sum of two millions two hundred thousand dollars.

Orator further shows unto your honors that the several persons aforesaid by whom orator's notes were endorsed as aforesaid are partially secured with respect thereto by a pledge of bonds secured by said collateral trust to the nominal amount set forth in Exhibit A aforesaid, and to that extent said persons have a lien upon all the property embraced in said collateral trust, including the bonds, stocks, rolling stock, engines, and real estate specified in said collateral trust.

And orator further showeth unto your honors that orator is now indebted to said St. Louis, Iron Mountain & Southern Railway Company for money advanced over and above the net earnings of
345 orator's lines leased as aforesaid *in* about the sum of $1,150,091.30 of principal, with interest accruing thereon, and that said sum of principal and the interest thereof is secured by bonds issued as aforesaid and secured by said collateral trust.

Your orator further showeth that by reason of the failure of the crops aforesaid and the enormous expenses imposed upon orator by the recurrence of extreme freshets as aforesaid, and by reason of the

cost of completing its lines as aforesaid, a large floating debt has accumulated against your orator, amounting in the aggregate to about the sum of 4,784,145.01 dollars.

That a portion of said indebtedness is represented by small judgments, and the greater portion is distributed among a vast number of persons, all or nearly all of whom are pressing orator for payment and threatening and, as orator alleges upon information and belief, intending to resort to every legal method of enforcing the collection of the said claims.

The orator is largely indebted to a number of other railroad companies on balances arising from an exchange business. The exact amount of said indebtedness is not known to orator, as the total thereof is continually changing; but orator avers that payment of said balances within a reasonable time is necessary to the preservation of the business of orator in exchange with such other companies, and, if the amount of such exchange balances due from orator shall not be promptly paid, many of said companies connecting and exchanging business with your orator will withdraw their business and exchange of traffic, and thus greatly reduce the income and impair the earnings of orator; that such balances were received by orator in trust for the several companies entitled to the same.

Your orator would further show that by the terms of nearly all, if not quite all, the mortgages and trust deeds aforesaid,
346 whether executed by orator or by other companies, on any portions of said lines prior to the time when orator acquired the same not only embrac*ing* the roads and tangible property of the companies executing said instruments, but also the revenues and incomes to be derived from the use of the parts of said roads so mortgaged, and the holders of the bonds secured by said mortgages have always insisted upon their rights to look to the revenues of the sections of the railroad upon which the mortgages rested as a means of paying and discharging said bonds.

That all or nearly all of said mortgages embraced all rolling stock to be thereafter acquired by the company executing such mortgages, but that as such original companies and those lines of railroad have been gradually absorbed in orator's vast system the rolling stock on said entire system has become so intermingled as to be incapable of division according to the original ownership of the said several lines of road or according to said several mortgages, and any attempt to control or dispose of portion of such rolling stock by any court or courts not having jurisdiction of the whole and not competent to deal with orator's entire property as a unit would produce great confusion and uncertainty and would result in great loss to all persons interested in said rolling stock or in orator's property or securities.

Further complaining, your orator would show to your honors that the directors and officers of your orator's company have thoroughly considered and already resorted to all proper measures for obtaining the means with which to pay the floating indebtedness of said company, and also to meet the large amounts of accruing interest which will fall due at the beginning of the month of June next and con-

tinue to mature by installments at very short intervals. But, may it please your honors, so it is that said officers and directors have hitherto wholly failed to provide the means with which to
347 discharge said floating indebtedness and to meet said accruing interest; that your orator is powerless now to accomplish such purpose, and for the time being, at least, is practically insolvent; that in spite of all the exertion of orator and its officers it is now certain that a default in the payment of interest maturing in June next will occur, and that orator will also be without means of meeting its floating indebtedness.

Your orator further showeth unto your honors that several of the leasehold interests possessed by orator are of extreme importance, as some of the lines so leased form valuable links in the chain of your orator's lines, as, for instance, a leasehold interest under the Western Indiana Railroad Company, by means of which orator reaches its terminus in the city of Chicago and is enabled to do a valuable business there.

That under the terms of said leases the lessor companies will be enabled to declare a forfeiture of orator's rights unless promptly paid the rentals accruing therefor, and that, unless some provision is made by which such rentals as may shortly mature can be promptly met, your orator's leasehold interests or some of them, of great value, will be declared forfeited and wholly lost to orator and orator's lines and power of earning money will be thereby very seriously affected.

And orator further alleges that a large portion of the rolling stock in use by orator and necessary to the transaction of its business is held under conditional contracts of purchase, the title to such property not vesting in orator until fully paid for, and orator is liable to lose said property and to a forfeiture of the amount already paid thereon if it should make default in making further payments for such rolling stock as such payments mature.

Your orator further showeth unto your honors and avers, upon information and belief, that as soon as default shall be made
348 in the payment of bonded interest maturing early in the month of June next a large number of suits will be commenced at law in the numerous State courts along the lines of orator's road, and that orator's supplies, materials, rolling stock, and other personal property will be seized under execution and attachment and your orator thereby deprived of the means of operating its road; that such a result would be almost, if not quite, ruinous to the prospect of orator with reference to earning a revenue, and more particularly disastrous because the present promise of an excellent crop in the West offers strong hope that a large revenue will be earned by orator or by the use of orator's lines of road in the near future; but if orator's rolling stock, materials, and supplies be seized under execution and attachment (as they undoubtedly will unless protected by the action of the court of equity) the benefits of moving the now growing crop and the large revenues to be fairly hoped for as arising from such traffic will be lost, not only to orator, but to all persons interested in orator's railroads and property.

And, further complaining, your orator also shows and alleges,

upon information and belief, that, unless protected by a court of equity, as soon as the anticipated default aforesaid in the payment of interest shall occur a number of suits will be commenced in the State or Federal courts held near the line of orator's railroad for the appointment of receivers under the original sectional mortgages executed by the several corporations on portions of orator's lines before orator acquired the same.

That in that event orator's lines of road will be broken into fragments; that the unity of orator's system of roads will be entirely destroyed; that orator will be prevented from realizing a revenue from the use of its lines, and that, in all probability, orator's roads will be sold in small sections, so that it will be impossible to re-establish the unity thereof now existing.

349 And your orator avers that the interests of orator in said road and of all its creditors and holders of the bonds aforesaid are greatly imperiled by the existing prospect of the disruption of said road on the happening of the default impending as aforesaid, and the interests of all parties can only be protected by the interposition of a court of chancery.

That if said lines of railroad are broken up as aforesaid and the fragments thereof placed in the hands of various receivers and the rolling stock, materials, and supplies seized and scattered abroad in the manner above indicated the result will produce irreparable injury and damage, not merely to orator, but to all persons having any interest in said lines of road and the securities thereof; and in order that the extent and location of orator's lines of railroad may be better known orator files a map showing the location of said lines and the States wherein they are situated, and marks said map Exhibit G and prays that same be taken as a part of the bill of complaint.

And, further complaining unto your honors, your orator would also show that your orator is now indebted in very large sums of money to a multitude of laborers who have little to live upon other than the fruits of their daily labor; that orator cannot state the amount of money so due to laborers, but avers it to be large, and that if payment of such indebtedness be not made, or at least secured by the action of court of equity, by preventing the disruption of said property and the wasting of orator's assets great and widespread suffering will ensue to said laborers and irreparable injury be thereby produced.

And your orator further showeth unto your honors that your orator and its board of directors, conceiving that its was their duty to protect said property and to treat the same as a trust fund for the security, first of its creditors and then of orator's stockholders,

350 have determined to appeal to your honors, sitting in chancery, to take possession of the said lines of road through the instrumentality of one or more receivers, and thereby to prevent the breaking up of said lines of road and the scattering abroad of its assets in the manner above indicated.

And orator alleges, upon information and belief, that it is the intention of the trustees named in the general mortgage aforesaid, as soon as the impending default aforesaid shall occur and as soon

as they may lawfully act under the terms of their trust, to proceed to foreclose the said general mortgage, and they intend to take steps in your honors' court for that purpose.

And orator, on information and belief, states that said trustees intend to proceed in this cause by means of a cross-bill to accomplish the said result above mentioned, but before said trustees could, under the terms of their said trust, file either an original bill or a cross-bill herein, and on their motion obtain the appointment of a receiver or receivers, the evil results apprehended by orator and described as aforesaid will certainly occur and the property aforesaid, real and personal, will be broken up, the unity of orator's system destroyed, and its equipment scattered abroad.

Inasmuch as orator has not an adequate remedy at law in the premises, it prays your honors to take cognizance of this bill of complaint; that in order to the preservation of the interests of large numbers of persons, stockholders and creditors, unknown to your orator, and in order to the protection of the interests of all concerned and to prevent a great multiplicity of suits, your honors will appoint one or more receivers, and empower and direct such receiver or receivers to take possession of said entire property and to preserve, operate, and manage and control the same, collect all indebtedness due or to become due to orator, and otherwise to discharge
351 all the duties ordinarily imposed by courts of equity on the receivers of railroad property by such courts appointed.

That on a final hearing of said cause your honors will, under this bill, or under such amendments as may be made thereto, or such supplemental bills as shall be filed herein, or such cross-bills as parties in interest may also file, decree the sale of said entire property, whether such decree shall judicially foreclose said general mortgage or any of the other mortgages aforesaid, or whether such decree shall dispose of said property as a trust fund on general equitable principles; that your honors will cause all the liens upon said property or any part thereof and all rights, claims, and equities of all persons interested therein — be ascertained, defined, and determined, and that the proceeds arising from the sale of such property or any part thereof be applied under the orders and decrees of this court according to the rights, interests, and equities of parties or persons interested in said fund.

Orator would further show that the moneys derived from the promissory notes as aforesaid, indorsed as aforesaid, were applied to the payment of interest accruing on bonds secured by the mortgages aforesaid prior and superior to the bonds secured by the general mortgage aforesaid, and also to the payment of maturing installments of the purchase-money of rolling stock necessary and indispensable to the use of orator's road, which payment was necessary in order to prevent the forfeiture of orator's interest in said rolling stock and its right to the use and possession thereof.

And orator would further show that the said collateral trust, which said endorsers have a right to reply upon as indemnity to them, embraces a large amount of valuable rolling stock necessary to the operation of orator's lines of road, and it also embraces very

valuable terminal facilities in the city of Chicago and in the
352 other cities aforesaid, by means of which orator is enabled to transact its important business in said cities, and without which orator would be unable to maintain its growing trade in said cities.

That it is now and will continue to be very important to orator that such receiver or receivers as your honors may appoint should prevent the foreclosure of said collateral trust and the loss of orator's terminal facilities aforesaid in the city of Chicago and said other cities, and the taking from orator of the valuable rolling stock embraced in said collateral trust; and your orator therefore specially prays your honors to make such preliminary orders or decrees or such orders and decrees as can be made at a very early date enabling such receiver or receivers to protect the endorsers upon said promissory notes of orator, and thereby to prevent the foreclosure of said collateral trust and the loss of the rolling stock and terminal facilities hereinbefore last mentioned.

Orator also prays that such orders be made as would enable such receiver or receivers to raise money with which to pay all rentals accrued or accruing, the payment of which are necessary to prevent the forfeiture of orator's valuable leasehold interests, and thus prevent the breaking up of orator's lines.

That your honors will order and direct that said receivers, after paying the current expenses of operating and maintaining said railroads, and also paying for all labor, supplies, rentals, and services aforesaid, and also after protecting the endorsers aforesaid, and thus preventing the forfeiture of orator's interests, rights, and property embraced in said collateral trust, and also after paying such claims as require to be paid in order to prevent a forfeiture of orator's rights and interests in all rolling stock and equipments, apply the residue or surplus of all incomes, revenues, and earnings of said railroads and all other assets coming into their hands as such
353 receivers to the discharge of all debts, obligations, and liabilities of orator according to the rights and legal and equitable priorities of all concerned, as creditors or otherwise, under the direction of the court.

And orator hereby makes defendants the following persons and corporations:

The Central Trust Company of New York, as aforesaid, the same being a citizen and resident of the State of New York, as aforesaid, and James Cheney, a citizen and resident of the State of Indiana, as aforesaid, trustees under said general mortgage; also The St. Louis, Iron Mountain & Southern Railway Company, being a citizen and resident of the State of Missouri, as aforesaid; also The Mercantile Trust Company of New York, the same being a citizen and resident of the State of New York, as aforesaid.

Also the following persons and corporations:

The Farmers' Loan & Trust Company of New York, a corporation organized under and by virtue of the laws of the State of New York; James R. Jessup, John T. Terry, Daniel A. Lindley, Alfred T. White, H. F. Spaulding, Wager Swayne, Lewis H. Meyer, J. P. Giraud Fos-

ter, Clifford A. Hand, Robert C. Martin, George P. Gould, George S. Coe, George T. Davis, George I. Seney, John Paton, all of whom are citizens and residents of the State of New York; Solon Humphreys, a citizen and resident of the State of New Jersey; Archibald Hopkins, a citizen and resident of Washington, D. C.; John M. Woodson, James B. Eads, H. F. Vail, and Charles Parsons, all of whom are citizens and residents of the State of Missouri; James Cheney, Abraham W. Hendricks, who are citizens and residents of the State of Indiana; H. W. Ford, R. S. Brock, G. E. Leighton, Thomas B. Coulter, P. H. Brown, R. A. Betts, George M. Rice, J. Kimball, E. P. Burnham, J. A. Jamison; The Eel River Railroad Company, a corporation of the State of Indiana and a citizen
354 and resident of said State; The Toledo, Peoria & Western Railroad Company, a corporation of the State of Illinois and a citizen and resident of the same; The Boone County & Booneville Railroad Company, St. Louis, Ottumwa & Cedar Rapids Railroad Company, The St. Joseph & St. Louis Railroad Company, The Brunswick & Chillicothe Railroad Company, St. Louis, Council Bluffs & Omaha Railroad Company; St. Louis, Kansas City & Northern Railway Company, a citizen and resident of the State of Missouri; Des Moines & St. Louis Railroad Company; St. Louis, Jerseyville & Springfield Railroad Company, a corporation of the State of Illinois and a resident and citizen of said State; Des Moines & Northwestern Railroad Company, a corporation, citizen, and resident of State of Illinois; Champaign & Southeastern Railroad Company, The St. Louis Bridge Company.

Your orator would show that all the above-named defendants have or claim to have interests in the lines of your orator as lessors, mortgagors, or trustees under deeds of trust covering your orator's said lines or portions thereof.

And orator would further show, upon information and belief, that George Griswold and L. R. Tilton were co-trustees with James R. Jessup under the deed of trust, mentioned in Exhibit A, made by the Illinois & Southern Iowa Railroad Company in March, 1862, and that said Griswold and Tilton have departed this life; also that Edwin D. Morgan, sole trustee of two of the mortgages mentioned in Exhibit A, attached to this complaint, has departed this life; that Orville H. Browning, co-trustee of Solon Humphreys under the mortgage made by Quincy, Missouri & Pacific Railroad
355 Company in October, 1879, has also departed this life, and that H. F. Vail, co-trustee with Charles Parsons under the mortgage of the St. Charles bridge of October, 1878, has, as orator is informed and believes, also departed this life.

And the orator prays your honors to appoint successors to said trustees so deceased for the proper execution of their several trusts or to make such other order with respect thereto as will cause said trusts to be properly represented in the matters of this litigation.

Orator prays that all the defendants aforesaid and all such trustees as your honors may appoint be required to set up their several interests, so that the same may be fully represented in this cause.

And your orator avers that there is in this cause a dispute and

controversy wholly between your orator and the said trustees under said general trust mortgage, and there is also a separate dispute and controversy in this cause wholly between orator and the trustees under the said several other mortgages herein set forth, and that such controversy may be determined as between orator and the trustees under each of said mortgages, without reference to the other defendants herein.

Your orator prays that the said defendants and each of them may be required by a writ of subpœna to be and appear before your honors in the court of chancery on the first day of the next term of this court, or as soon thereafter as proper service may be had upon them or either of them; that said defendants and each of them be required to answer this bill of complaint, but not upon oath, answer upon oath being hereby expressly waived.

That this court direct all persons and all corporations being possessed of the property of orator or any part of it to surrender the same to such receiver or receivers as your honors may appoint, or to hold such property or portions of property under said re-
356 ceiver or receivers if the latter shall elect to pursue such course; and your orator states further to your honors that it is the intention of orator, as soon as a receiver or receivers shall be appointed as aforesaid and as soon as your honors have acquired primary jurisdiction of said cause and said property, to file like bills in the circuit courts of the United States of each of the districts into which such lines extend, praying such courts to take ancilliary jurisdiction of said cause and to aid your honors in administering said property and disposing of the same according to the rights of all parties.

Orator further represents to your honors that it will become very important to the interest of your orator and its creditors that the operation of orator's lines of road should not be interrupted, and that business relations with other lines of railroad and with all persons engaged in the practical operation of orator's lines should be maintained and preserved, and to that end it will be necessary and important that the balance due to other lines of road and amounts due laborers, employees of various kinds, attorneys and others performing professional services for orator, and also all claims for supplies and materials furnished orator, should be met and paid; otherwise it is very probable that a large number of laborers and other employees will suddenly abandon the service of orator and persons who have been furnishing materials and supplies to orator will suddenly cease to furnish the same; and therefore orator prays your honors to direct such receiver or receivers as may be appointed herein, out of the earnings of said road or out of any moneys available, to pay all such unsatisfied claims for current expenses, supplies, labor, exchange of traffic, and professional services, and that such payments include all the claims of the character aforesaid accruing or maturing within a reasonable time before the filing of this bill.

357 Orator further shows unto your honors that by reason of the number of defendants herein, and by reason of their

residences being in many instances far apart, and by reason of the pressing need of the appointment of a receiver to prevent the disastrous consequences hereinbefore indicated orator has not been able to serve notices upon all of the defendants of the application intended to be made for the appointment of a receiver or receivers, but orator has caused notice hereof, together with a copy of this bill, to be served on the trustees aforesaid of the Central Trust Company of New York and defendant Cheney, who represent the largest interest and most important creditors of orator; and orator has also caused like notice to be served upon the defendant.

And orators prays your honors to make such order in the premises as will insure the protection of the interests of orator and its creditors, giving an opportunity to all the defendants not served with notice to be heard hereafter; and orator avers that no injury can arise to any creditor or person in interest from the appointment of the said receivers, with or without notice, as such receivers' possession will inure to the benefit of all the persons concerned.

And your orator prays such other and further relief as the nature of its case may demand and as shall seem to your honors consistent with equity and good conscience. And your orator, as in duty bound, will ever pray, &c.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY,
By WAGER SWAYNE, *Solicitor for Complainant.*

358 STATE OF NEW YORK, }
County of New York. }

Before me, William J. Harding, a notary public in and for the county and State aforesaid, on this 22d day of May, A. D. 1884, at my office, in said county, personally appeared A. L. Hopkins, who, being by me duly sworn, makes oath as follows:

"I, Amos L. Hopkins, do hereby depose and say that I am now and have been for a long space of time vice-president of the Wabash, St. Louis & Pacific Railway Company and one of the executive officers of said company; that under my official relations with said company I am as well informed of the facts and statements set forth in the foregoing bill of complaint as any other officer of said company. And I further say that all the averments and statements contained in said bill of complaint and in the bill made part thereof are true, as I am informed and verily believe; and further I say not.

A. L. HOPKINS."

Sworn and subscribed before me the day and year last above written.

Witness my hand and notarial seal.

[SEAL.] WM. J. HARDING,
Notary Public, Kings County, New York.

Certificate filed in New York county.

(8424A)

359 The part of the mortgage referred to in the bill as the "general mortgage," which described the property covered thereby, is as follows, to wit:

General Mortgage.

"Now, therefore, be it known that the Wabash, St. Louis and Pacific Railway Company, party of the first part, in consideration of the premises and in order to the security of the bonds hereinbefore described to the extent of fifty millions of dollars, and no more, has this day granted, bargained, sold, conveyed, and transferred unto the said Central Trust Company of New York and James Cheney, of Indiana, trustees, their heirs and successors in said trust, all of the right of way and railroad of the said first party extending from the city of Toledo, in the State of Ohio, through the State of Indiana, and thence into the State of Illinois to Meredosia, with branch of said road to Naples and East Hannibal, and from Meredosia to Camp Point, in the State of Illinois, and with branch of said road from Clayton to the east bank of the Mississippi river at Hamilton, in said State, and with branch of said road leading from Decatur, in said State, to East St. Louis, in the same State; and also the railway of the party of the first part extending from St. Louis, in the State of Missouri, in a northwesterly direction, to Kansas City, Missouri, with a lateral extension from Moberly, in the county of Randolph, to Ottumwa, in the State of Iowa, and a branch from Salisbury, in the county of Chariton, State of Missouri, to Glasgow, in the county of Howard, in said State; and also an extension from Brunswick, in said county of Chariton, in a northwesterly direction, to the city of Council Bluffs, in the State of Iowa, which lines of railroad will, when united, form one continuous line of railway in the same general direction from the waters of Lake Erie at Toledo, Ohio, to the cities of Council Bluffs and Kansas City, on the
360 Missouri river, as aforesaid, together with all the embankments, bridges, turnouts, side tracks, buildings and structures, water tanks and fixtures, shops, engine and other houses, depots, turn-tables, engines, cars, machinery, tools, ferry and other boats, and every other thing appurtenant to said railroad or used in connection therewith belonging to the said first party, together with all rents, issues, and profits, credits, and choses in action accruing to said first party from said railroad and appurtenances as owner and holder thereof.

And the said Wabash, St. Louis and Pacific Railway Company, in consideration of the premises above recited and for the further security of the bonds above described, does hereby grant, bargain, sell, assign, transfer, and convey unto the said Central Trust Company of New York and James Cheney, trustees, their heirs and successors in said trust, all the right, title, and interest of said first party, as the same now exists or may hereafter exist by virtue of any contract, lease, purchase, or consolidation, in and to the following-described railroads now in progress of amalgamation with the railroad of said first party, including with said railroads every appurtenance thereto or

thing used in connection therewith and all rents, issues, and profits arising therefrom to said first party, all of the above as fully as are above described with reference to the railroad now owned and held by said first party and as fully as it is or may be possible for said first party to convey the same:

The Boone County and Booneville railway, extending from Centralia to Columbia, in the State of Missouri.

The St. Louis, Ottumwa and Cedar Rapids railway, extending from Moberly, in the State of Missouri, to Ottumwa, in the State of Iowa.

The St. Joseph & St. Louis railway, extending from New Lexington and Richmond and Lexington Junction to St. Joseph, in the State of Missouri.

361 The Brunswick & Chillicothe railway, extending from Brunswick to Chillicothe, in the State of Missouri.

The St. Louis, Council Bluffs and Omaha railway, extending from Chillicothe to Elm Flats, in the State of Missouri.

The Chicago & Paducah railway, extending from Effingham and Altamount to Streator, in the State of Illinois.

The Chicago & Strawn railway, extending from Strawn to Chicago, in the State of Illinois.

The Eel River railway, extending from Logansport to Butler, in the State of Indiana.

The Quincy, Missouri & Pacific railway, extending from West Quincy, in the State of Missouri, to the Missouri river opposite Brownsville, Nebraska.

The Missouri, Iowa & Nebraska railway, extending from Keokuk, Iowa, to a junction with the Omaha Division of the Wabash, St. Louis and Pacific railway near the line between the State of Iowa and the State of Missouri.

The Champaign, Havana & Western railway, extending from Champaign to Havana, in the State of Illinois, and from White Heath to Decatur, in the State of Illinois.

The Toledo, Peoria & Western railway, extending from Warsaw, in the State of Illinois, to the State line of Indiana, and from La Harpe, in the State of Illinois, to Burlington, in the State of Iowa.

The Detroit, Butler & St. Louis railway, from Butler, in the State of Indiana, to Detroit, in the State of Michigan."

On the 27th day of May, 1884, Solon Humphreys and Thomas E. Tutt were appointed receivers of said railway company by an order duly made by said court, of which the following is a copy:

362 In the Circuit Court of the United States for the Eastern District of Missouri, of the March Term, 1884.

THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, Complainant,
against
THE CENTRAL TRUST COMPANY OF NEW YORK, James Cheney, The Mercantile Trust Company of New York, and Others, Defendants.
} In Chancery.

Order of Court.

Now, on this 27th day of May, 1884, comes the said complainant, by its solicitors and counsel, and, having filed its bill of complaint and exhibits herein, prays the court to appoint a receiver or receivers, with power to take possession of, manage, operate, control, and preserve all the railroads owned, operated, or leased by the said complainant, and also all property of every description, real, personal, and mixed, and all rights, credits, and choses in action of the said complainant, whether situated within the said eastern district of Missouri or elsewhere.

And the complainant having by the said bill of complaint and exhibits forming a part thereof shown the court that there is great danger of loss, waste, and destruction of the property of complainant or valuable parts thereof, unless such receiver or receivers be appointed, and the application having been by the Hon. Samuel Treat, district judge for the eastern district of Missouri, referred to me for consideration, and the court having duly considered said application, it is—

Ordered, adjudged, and decreed that Solon Humphreys and Thomas E. Tutt be, and the same are hereby, appointed receivers of the said railroads and all the property of said company, with power and instructions to take possession of the same, and to manage, control, and operate said railroad, preserve and protect all said property, and collect, as far as possible, all accounts, choses in action, and credits due to said company, acting in all things under the order of this court or of such other courts as may entertain jurisdiction of parts of said property as ancillary to the jurisdiction of this court.

That the receivers, before entering upon their duties, give their joint and several bond to the master in chancery of this court, for the benefit of all whom it may concern, in the penal sum of five hundred thousand dollars, conditioned for the faithful performance by said receivers of their duties as such, and that they will in all things observe and perform the orders of this court now or hereafter to be made.

It is further ordered that the said receivers, out of the income that shall come into their hands from the operation of said rail-
363 road or otherwise, proceed to pay all balances due or to become due to other railroads or transportation companies on balances growing out of the exchange of traffic accruing during six months prior hereto.

That said receivers also in like manner pay all rentals accrued or

which may hereafter accrue upon all leased lines of said complainant and for the use of all terminals or track facilities, and all such rentals or instalments as may fall due from said complainant for the use of any portion of road or roads or terminal facilities of any other company or companies, and also for all rentals due or to become due upon rolling stock heretofore sold to complainant and partially paid for.

That said receivers also pay in like manner, out of any incomes or other available revenues which may come into their hands, all just claims and accounts for labor, supplies, professional services, salaries of officers and employees that had been earned or have matured within six months before the making of this order.

That said receivers present their said bond to this court or any judge thereof for approval, and that upon said presentation and approval of said bond said receivers are entitled and required to proceed at once with the performance of their duties.

It is further ordered that all parties herein, upon being informed of this order and of the approval of said bond by this court, proceed to surrender all the lines of said railroad, and all the property, choses in action, and accounts of said company to said receivers; and the complainant is authorized to apply to any other United States circuit court of competent jurisdiction for such order or orders in aid of the primary jurisdiction vested in this court in said cause as may have ancillary jurisdiction herein.

It is further ordered that said receivers pay all current expenses in the operation of said road, collect all the revenues thereof, and all choses in action, accounts, and credits due and to become due to the company.

That such receivers keep such accounts as may be necessary to show the source from which all such income and revenues shall be derived with reference to the interest of all parties herein and the expenditures by them made.

That said receivers report to this court, from time to time, once in each three months, their doings under this decree, and that they apply for instructions to this court when necessary.

And said receivers having filed their bond as required by this order and the court having fully approved the same, said appointment is hereby confirmed and said receivers are hereby required to proceed with their duties under said appointment.

DAVID J. BREWER,
Circuit Judge.

AT CHAMBERS, *May* 29, 1884.

The order heretofore entered in this case for the appointment of receivers is modified by striking out of the third paragraph of said order the words "to the master in chancery of this court," so that the paragraph shall read as follows: "That the receivers, before entering upon their duties, give their joint and several bond, for the benefit of all whom it may concern, in the penal sum of five hundred thousand dollars, conditioned for the faithful performance by said receivers of their duties as such, and that they will in all things

observe and perform the orders of this court now or hereafter to be made."

364 *Cross-Bill of Central Trust Co. of New York and James Cheney, Filed.*

On the 9th day of June, 1884, there was filed in said court in said cause No. 2357, by leave of court, the cross-bill of said The Central Trust Company of New York and James Cheney, setting up default in the payment of interest due June 1st, 1884, and praying for the foreclosure of the mortgage in which they were trustees, being styled the "general mortgage;" also of certain mortgages executed in aid of said "general mortgage," and in said cross-bill styled "sustaining mortgages," and for the sale of the property covered thereby. Said cross-bill mentions the road of intervenor as being part of the property covered by the "general mortgage."

Among the allegations of said cross-bill are the following, to wit:

And your orators further show that, as they are informed and believe, the said Wabash, St. Louis and Pacific Railway Company did, after the execution, delivery, and recording of said general mortgage, from time to time, make and issue its promissory notes for very large sums of money and procured the same to be endorsed by Solon Humphreys and divers other persons whose names are unknown to your orators; that the said railway company sold said notes to the Equitable Life Assurance Company of New York and pledged with the endorsers thereof certain of the said collateral trust bonds by way of security for the payment of the same.

And your orators further show unto your honors that they intended and proposed to bring their bill of complaint in this honorable court for the foreclosure of the said general mortgage and to protect the rights and interests of the holders of the bonds and coupons secured thereby by a sale of the said mortgaged property so soon as default should be made in the performance of the terms and conditions of said general mortgage; but now so it is, may

365 it please your honors, that the said Wabash, St. Louis and Pacific Railroad Company, combining and confederating with Solon Humphreys and divers other persons at present unknown to your orators, whose names, when discovered, your orators pray — may be at liberty to insert herein and afterwards to charge them as parties defendant hereto, has lately and before the first day of June, 1884, filed its bill in this honorable court against your orators and the several persons who are named as trustees in the several mortgages aforesaid and the railway corporations aforesaid and others, and has since filed its amendment to said bill praying, among other things, that this court take cognizance of said bill and appoint one or more receivers of the said railways and property and direct such receivers to take possession of and operate the same; that the court, under said bill or under such cross-bills as the parties in interest may also file, may decree the sale of said entire property and cause all the liens upon the same or any part thereof and all rights,

claims, and equities of all persons interested therein to be ascertained, and that the proceeds arising from the sale of such property or any part thereof be applied, under the orders and decrees of this court, according to the rights, interests, and equities of parties or persons interested in said fund.

The cross-bill then alleges that "unless the said lines of railway shall be operated, managed, or controlled by a receiver or receivers appointed by the court there will be a multiplicity of suits and judgments against said railway company, which will obstruct the operation of said railways and cause great loss to the holders of the bonds aforesaid and a sacrifice of the property of the said railway company," and prays that pending the suit a receiver or receivers may be appointed, with the usual powers of receivers in like cases, of all and singular the mortgaged property and premises, and
366 that such receivers be authorized and directed to maintain and operate "said railroads" and to keep the same in proper repair.

Court Overrules Motion for Receivers under Cross-Bill.

On the 14th day of October, 1884, the Central Trust Company and Cheney moved the court to appoint receivers under their cross-bill as therein prayed for, which motion was by the court overruled, and the court thereupon refused to make any appointment of receivers under said cross-bill as prayed for.

In overruling said motion the following opinion was delivered by the court (Treat, judge):

Mr. PHILLIPS (of counsel for the Central Trust Company and Cheney) said: "There is an application made in the cross-bill itself for the appointment of a receiver.

The COURT: Which I shall not grant.

Mr. PHILLIPS: Reciting, as it does, the fact of the appointment already by the court of receivers under the original bill.

The COURT: That is a matter of form.

Mr. PHILLIPS: I suppose so, but at the same time I will state to the court there are reasons which have occurred to the receivers themselves and their counsel which, it seems, will make it proper for the court at some time when the court sees fit to take it up under the cross-bill by an order appointing receivers under the cross-bill. There is a proceeding to sell out; there is a mortgage which covers the whole of it, and it is, really, the only way by which the court can get hold of this property and handle it, and I know the receivers and counsel have felt greatly troubled to know precisely as to how they were moving in this matter. Now, the Central Trust Company represents a mortgage which covers the whole line, and I wish to call the attention of the court to it to-day, be-
367 cause I have a telegram from one of the counsel in New York that he will be here in a day or two, and I have talked with Mr. Blodgett and Mr. Smith, representing the receivers, and we have considered it desirable that the court should take this matter

up at some early day, and by an order appoint receivers under the cross-bill. Of course the Central Trust Company has no suggestion as to who shall be appointed as receivers. It is perfectly satisfied, as I understand——

The COURT: I understand the general aspect of the case, but not its details. Of course you will have leave to file your amended cross-bill. If you wish process to bring somebody in who is not in you can ask the court for it. All those that are here, of course, are here, and if you have got somebody who is not here and want process you will have to follow the rules prescribed by the statute. I will say again, as Brother Brewer said, and concurred in by Brother Miller, and as I have said over and over again, that it is not the function of the court to run a railroad indefinitely. This case is a little peculiar, because the receiver is appointed at the instance of the corporation itself. You come in now with a cross-bill. Ordinarily your client would be the moving party. Now, you want to foreclose that mortgage, and that is the important question on that cross-bill, to see how soon I can get rid of the whole of this business.

Mr. SMITH: And to transfer the receivership to the receivership under the cross-bill.

The COURT: Oh, no; that is an application I shall pay no attention to at present. I may appoint the same receivers for the intermediate time, to which, I understand, there is no exception. Mr. Phillips only desires in his cross-bill, which is in the ordinary form (if he had been the original complainant in the case that would have been his prayer), but he follows it as if it were an original
368 bill and all the requirements thereof, and he asks, pending this litigation, in behalf of the mortgagees, that some one shall preserve the property for the benefit of the mortgagees. Very well; that involves no question except a technical or formal one, and the court may appoint the same men to do that. That is all there is of that.

Amended Bill of Complaint Filed.

On the 15th day of June, 1884, there was filed in said cause No. 2357, by leave of court, by said Wabash, St. Louis and Pacific Railway Company, an amended bill of complaint, setting forth with greater particularity than in the original bill of complaint the condition of the various lines of railway belonging to the complainant company, the respective titles of said complainant to the various parts thereof, the liens and encumbrances thereon, and the financial condition of said company; all of which were substantially as shown in the final decree. That part of the amended bill relating to the lease of this intervenor is as follows:

"Orator would further show that on the 17th day of March, 1874, there existed under the laws of the State of Missouri a body corporate entitled the St. Joseph and St. Louis Railroad Company, which said corporation was the owner of a line of railroad extending from St. Joseph, in said State, to a point on the bank of the Missouri river opposite the city of Lexington, in said State, said

point being now known as North Lexington, a distance of 72.2 miles; that on the 1st day of June, 1874, said company leased all its said railroad, with right of way, obtained and to be obtained, and the right to construct a road upon said right of way, and all property and franchise, real, personal, and mixed, of said lessor company, for the period of 99 years from the date of said lease, to the St. Louis, Kansas City and Northern Railway Company; and the said lessee company by the terms of said lease agreed to pay
369 as rental for said property $10,000 per annum for the first two years; $35,000 per annum for the third, fourth, and fifth years, and for each subsequent year of said term 30 per cent. of the gross earnings of said railroad, the lessee company guaranteeing that said percentage should not during any of said years after the first five years amount to less than $25,000.

It was further provided that the rentals reserved in said lease were to be paid on the first day of March and September of each year, and that said lessee company would pay all taxes lawfully imposed on said property or the business done thereon, including the year 1874, but not before that time.

It was further provided in said lease that in case default should be made in the payment of any part of the rental reserved thereon and such default should continue for thirty days, or if said lessee should fail to keep any of the covenants of said lease on its part to be kept, then said lessor company was empowered to enter upon and repossess said property and at its option to declare said lease terminated and forfeited, provided that such forfeiture should not be declared except on failure of the lessee company to pay rent or taxes, unless after notice to the said lessee company to remedy such breach of covenant within three months from the date of such notice.

It was also provided in said lease that in case of default in the payment of rent by said lessee company such company should become liable to pay in addition to the rent due a sum equal to one-tenth of one per cent. on amount due for each day during such period of default until the forfeiture of said lease or the payment of said rental.

It was further provided that said lease should not be assignable or said property sublet without the consent of the lessor company.

370 And for further particulars as to the terms and conditions of said lease reference is hereby made to a copy of the same, marked sub-Exhibit F No. 18, page 216 of the printed books of exhibits filed herewith, which said copy orator prays may be taken as a part of this bill."

Said amended bill also contains the following allegations as to the St. Louis, Kansas City and Northern Railroad Company, the original lessee of the intervenor, to wit:

"Your orator would further show that after acquiring the leasehold interest last aforesaid, on the 12th day of August, 1874, said St. Louis, Kansas City and Northern Railway Company resolved to issue a series of bonds of $1,000 each, amounting in all to the sum

of $3,000,000, payable twenty-one years after date, with interest at the rate of 7 per cent. per annum, payable semi-annually, in the city of New York, on the first days of March and September of each year, on the presentation of proper coupons annexed to said bonds. In pursuance of said resolution said bonds were issued, bearing date September 1st, 1874, and the entire issue thereof were sold for value and are still outstanding and unpaid, and of the interest thereon there was accrued on the 1st day of July, 1884, a large sum, to wit, the sum of $70,000.

Orator would further show that in order to secure the payment of the principal and interest of said bonds said company, on the 12th day of August, 1874, executed its deed of trust to the Farmers' Loan and Trust Company of the City of New York, trustee, upon the entire line of the railway of said company and every part thereof in the State of Missouri, being 353 miles, as then constructed from North Market street, in the city of St. Louis, to the southern boundary line of the State of Iowa, and from Moberly, Missouri, to
371 North Missouri Junction, in Clay county, Missouri, and as the same might thereafter be constructed through Clay county, a distance of about eight miles, to the bridge across the Missouri river at Kansas City, in the county of Jackson, Missouri.

Also as the same was then or might thereafter be located in or through the city and county of St. Louis, to connect with the Union depot in said city.

Also as the same was then or might thereafter be located south of North Market street, in said city of St. Louis, together with all real estate, right of way, shops, rolling stock, depots, appurtenances, property, and franchises of said company.

Also certain tracts, blocks, and lots of land lying in the city and county of St. Louis, and certain other tracts, lots, and blocks of land lying in the county of Jackson, Missouri, and also certain tracts, blocks, and lots of land lying in the county of Randolph, Missouri, together with all structures, buildings, and appurtenances pertaining thereto, all more particularly described in said mortgage, a copy of which, marked sub-Exhibit F No. 13, will be found on page 180 of the printed volumes of exhibits filed herewith, and which copy of said mortgage is prayed to be taken as a part of this bill."

The allegation of said amended bill as to the consolidation of companies forming the Wabash, St. Louis and Pacific Railway Company is as follows, to wit:

"Your orator would further represent to your honors that in the month of November, 1879, the Wabash Railway Company aforesaid, created by the consolidation of corporations bearing the same names of the States of Ohio, Indiana, and Illinois, and the St. Louis, Kansas City and Northern railway, described as aforesaid, became consolidated with each other under the name of the Wabash, St. Louis and Pacific Railway Company, and from thence
372 hitherto has continued in existence under the said title; that the said Wabash Railway Company and the said St. Louis, Kansas City and Northern Railway Company, by the terms of said consolidation, consolidated their property, capital, and franchises,

the said Wabash Railway Company having then a capital stock of $16,000,000, and the said St. Louis, Kansas City and Northern Railway Company having then a capital stock of $24,000,000, including $12,000,000 preferred and $12,000,000 of common stock, and that the said consolidated company has a capital stock in the aggregate $40,000,000, and your orator will proceed herein to set forth the several interests, properties, and lines of railroad acquired by said consolidated company after it came into existence. For the terms of said consolidation your orator refers to a copy of the agreement for consolidation between said companies, marked sub-Exhibit F No. 38, beginning on page 370 of the printed volume of exhibits, and prays that the same may be taken as a part of the bill of complaint."

On the 26th day of June, 1884, said receivers filed in said court the following petition, to wit:

373 In the Circuit Court of the United States for the Eastern District of Missouri. March Term, A. D. 1884.

THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, Complainant,
against
THE CENERAL TRUST COMPANY OF NEW YORK, James Cheney, The Mercantile Trust Company of New York, and Others, Defendants. } In Chancery.

Petition of receivers for advice of court: 1st, as to payment of interest on certain enumerated bonds; 2d, as to payment of interest on bonds of Chicago Division; 3d, as to payment of rental of Eel River railroad; 4th, as to payment of interest on Detroit, Butler and St. Louis railroad; 5th, as to how they shall keep accounts of the earnings and expenses of certain enumerated lines.

Filed June 26, 1884.

Now comes Solon Humphreys and Thomas E. Tutt, receivers of all the property, rights, and credits of the Wabash, St. Louis & Pacific Railway Company, and respectfully state to the court that from the incoming rents and profits of said property they were
374 unable to pay on the first day of June, 1884, the interest falling due on said date upon the following bonds and other obligations of said company, to wit:

1st. Twelve hundred and ten (1,210) bonds of one thousand dollars each, known as the first-mortgage bonds of the Havana Division, issued in December, 1880, due thirty years after date, and bearing interest at the rate of six per cent. per annum, payable semi-annually, on the first days of June and December in each year, and which interest so due on said first day of June amounted to $36,300.00.

2d. Two thousand (2,000) bonds of one thousand dollars each, known as the first-mortgage bonds of the Indianapolis Division,

issued June, 1881, due forty years after date, and bearing interest at the rate of six per cent. per annum, payable semi-annually, on the first days of June and December in each year, and which interest so due on said first day of June amounted to $60,000.00.

3d. Seventeen thousand (17,000) bonds of one thousand dollars each, known as the general mortgage bonds, issued June, 1880, due forty years after date, and bearing interest at the rate of six per cent. per annnm, payable semi-annually, on the first days of June and December in each year, and which interest so due on said first day of June amounted to $480,000.00.

4th. Two thousand seven hundred and ninety-two (2,792) shares of the capital stock of the Eel River Railroad Company, on which the Wabash, St. Louis and Pacific Railway Company had obligated itself to pay dividends at the rate of four per cent. per annum, and on which the quarterly dividend due on said first day of June was $27,920.00.

375 Your petitioners further state that the Wabash, St. Louis and Pacific Railway Company was organized on the tenth day of November, 1879, by the consolidation of what was formerly known as the "Wabash Railway Company" (a corporation previously existing under the laws of Illinois, Indiana, and Ohio) with the St. Louis, Kansas City and Northern Railway Company (a corporation previously existing under the laws of Missouri), which companies were at and before said date possessed of certain valuable lines of railroad in the States of Missouri, Iowa, Illinois, Indiana, and Ohio, but which were held by them subject to mortgages and deeds of trust previously executed to secure certain bonds and obligations, to wit:

1st. Six thousand (6,000) bonds of one thousand dollars each, secured by first mortgage on the North Missouri railroad, (which bonds were) issued in March, 1865, due thirty years after date, with interest at the rate of seven per cent. per annum, payable semi-annually, on the first days of January and July of each year, and on which the semi-annual interest falling due on the first day of July, 1884, amounts to $210,000.00.

2d. Six hundred and twenty-six (626) bonds of one thousand dollars each, secured by first mortgage on the St. Louis, Council Bluffs and Omaha railroad, (which bonds were) issued in July, 1878, due thirty years after date, with interest at the rate of six per cent. per annum, payable semi-annually, on the first days of January and July in each year, and on which the semi-annual interest due on said first day of July amounts to $18,780.00.

3d. Two hundred and sixty-four (264) bonds of one thousand dollars each, known as the first-mortgage bonds of the Clarinda Branch, issued in July, 1879, due forty years after date, with interest
376 at the rate of six per cent. per annum, payable semi-annually, on the first days of February and August in each year, and on which the semi-annual interest due on the first day of August, 1884, amounts to $7,920.00.

4th. Nine hundred (900) bonds of one thousand dollars each, secured by first mortgage of the Toledo and Illinois railroad, issued

in September, 1853, and falling due in August, 1890, with interest at the rate of seven per cent. per annum, payable semi-annually, on the first days of February and August in each year, and on which the semi-annual interest falling due on said first day of August amounts to $31,500.00.

5th. Two thousand five hundred (2,500) bonds of one thousand dollars each, secured by first mortgage on the Lake Erie, Wabash and St. Louis railroad, issued in August, 1853, falling due in August, 1890, with interest at the rate of seven per cent. per annum, payable semi-annually, on the first days of February and August in each year, and on which the semi-annual interest falling due on said first day of August amounts to $87,500.00.

6th. Twenty-four hundred and ninety-six (2,496) bonds of one thousand dollars each, secured by first mortgage on what was known as the Great Western railroad, issued in May, 1863, and falling due in May, 1888, with interest at the rate of seven per cent. per annum, payable semi-annually, on the first days of February and August in each year, and on which the interest falling due on said first day of August amounts to $87,360.00.

7th. Three hundred (300) bonds of one thousand dollars each, secured by first mortgage on what was known as the Illinois and Southern Iowa railroad, issued in March, 1862, due twenty
377 years after date, with interest at the rate of six per cent. per annum, payable semi-annually, on the first days of February and August in each year, and on which the semi-annual interest falling due on said first day of August amounts to $9,000.

8th. Twenty-seven hundred (2,700) bonds of one thousand dollars each, secured by first mortgage on what was known as the Decatur and East St. Louis railroad, issued in June, 1869, due twenty years after date, with interest at the rate of seven per cent. per annum, payable semi-annually, on the first days of February and August in each year, and on which the semi-annual interest falling due on said first day of August amounts to $94,500.00.

9th. Twenty-six hundred and ten (2,610) bonds of one thousand dollars each, known as the consolidated sinking-fund bonds of the Toledo, Wabash and Western railroad, issued in February, 1867, due forty years after date, with interest at the rate of seven per cent. per annum, payable quarterly, on the first days of February, May, August, and November in each year, and on which the interest falling due on said first day of August amounts to $45,675.00.

10th. Eleven hundred and thirty-one (1,131) bonds of five hundred dollars each, known as the Wabash railway funded-debt bonds, issued in 1877, due thirty years after date, with interest at the rate — seven per cent. per annum, payable semi-annually, on the first days of February and August in each year, and on which the semi-annual interest falling due on said first day of August amounts to $19,792.50.

11th. Fourteen hundred and one (1,401) bonds of one thousand dollars each, known as the Wabash railway funded-debt bonds, graduated, issued in 1877, due thirty years after date, with inter-
378 est at the rate of six per cent. per annum, payable semi-an-

nually, on the first days of February and August in each year, and on which the semi-annual interest falling due on the said first day of August amounts to $42,030.00.

12th. Six hundred and nine (609) bonds of five hundred dollars each, secured by first mortgage on what was known as the Brunswick and Chillicothe railroad, issued August 1st, 1878, falling due in August, 1903, with interest at the rate of six per cent. per annum, payable semi-annually, on the first days of February and August in each year, and on which the semi-annual interest falling due on said first day of August amounts to $9,135.

13th. Three thousand (3,000) bonds of one thousand dollars each, known as the real-estate and railway mortgage bonds of the St. Louis, Kansas City and Northern Railway Company, issued in September, 1874, due twenty-one years after date, with interest at the rate of seven per cent. per annum, payable semi-annually, on the first days of March and September in each year, and on which the semi-annual interest falling due on the first day of September, 1884, amounts to the sum of $105,000.

14th. Certain certificates of indebtedness, amounting to the sum of $552,975.50, known as the graduated script certificates, issued in 1877, with interest at the rate of six per cent. per annum, payable on the first days of September, October, and November, and on which the interest falling due on said first day of September amounts to $11,059.51.

15th. Certificates of indebtedness, amounting to the sum of $115,385, known as seven per cent. script certificates, issued
379 in 1877, with interest at the rate of seven per cent. per annum, payable on the first days of September, October, and November, and on which the interest falling due on said first day of September amounts to $2,692.31.

16th. Two thousand (2,000) bonds of one thousand dollars each, known as the Wabash railway series of 1879, issued in May of said year, due thirty years after date, with interest at the rate of seven per cent. per annum, payable semi-annually, on the first days of April and October in each year, and on which the semi-annual interest falling due on the first day of October, 1884, amounts to $70,000.

17th. One thousand (1,000) bonds of one thousand dollars each, known as the first-mortgage bonds of the St. Charles Bridge Company, issued in October, 1878, due thirty years after date, with interest at the rate of six per cent. per annum, payable semi-annually, on the first days of April and October in each year, and on which the interest falling due on said first day of October amounts to $30,000.

18th. Seven hundred and seventy-seven (777) bonds of five hundred dollars each, known as the second-mortgage bonds on the St. Charles bridge, issued in 1878, falling due in 1903, with interest at the rate of seven per cent. per annum, payable semi-annually, on the first days of April and October of each year, and on which the interest falling due on said first day of October amounts to $13,597.50.

19th. Six hundred and forty-five (645) bonds of five hundred dol-

lars each, known as the first-mortgage bonds of the St. Louis, Ottumwa and Cedar Rapids Railroad Company, issued October 1st, 1875, due in October, 1897, with interest at the rate of seven per cent. per annum, payable semi-annually, on the first days of April and October of each year, and on which the semi-annual interest falling due on said first day of October amounts to $11,287.50.

380 20th. Twenty-three hundred and fifty (2,350) bonds of one thousand dollars each, known as the first-mortgage bonds of the Omaha Division of the St. Louis, Kansas City and Northern railway, issued February, 1879, due forty years after date, with interest at the rate of seven per cent. per annum, payable semi-annually, on the first days of April and October in each year, and on which the semi-annual interest falling due on said first day of October amounts to $82,250.

21st. Five hundred (500) bonds of one thousand dollars each, known as the first-mortgage bonds of the Quincy and Toledo railroad, issued in May, 1865, falling due in November, 1890, with interest at the rate of seven per cent. per annum, payable semi-annually, on the first days of May and November in each year, and on which the semi-annual interest falling due on the first day of November, 1884, is $17,500.

22nd. One thousand (1,000) bonds of one thousand dollars each, known as the second-mortgage bonds of the Toledo and Wabash railroad, issued in September, 1853, due forty years after date, with interest at the rate of seven per cent. per annum, payable semi-annually, on the first days of May and November in each year, and on which the semi-annual interest due on said first day of November is $35,000.

23rd. Fifteen hundred (1,500) bonds of one thousand dollars each, known as the second-mortgage bonds of the Wabash and Western railroad, issued in October, 1858, falling due in May, 1893, with interest at the rate of seven per cent. per annum, payable semi-annually, on the first days of May and November in each year, and on which the semi-annual interest due on said first day of November amounts to $52,500.

381 24th. Twenty-five hundred (2,500) bonds of one thousand dollars each, known as the second-mortgage bonds of the Great Western railroad of 1859, issued in May, 1865, and falling due in May, 1893, with interest at the rate of seven per cent. per annum, payable semi-annually, on the first days of May and November of each year, and on which the semi-annual interest falling due on said first day of November amounts to $87,500.

25th. One hundred (100) bonds of one thousand dollars each, known as the first-mortgage bonds of the Boone County and Boonville railroad, issued in May, 1873, and falling due in May, 1903, with interest at the rate of seven per cent. per annum, payable semi-annually, on the first days of May and November of each year, and on which the semi-annual interest due on said first day of November is $3,500.

26th. Five hundred (500) bonds of one thousand dollars each, known as the first-mortgage bonds of the Hannibal and Naples

Railroad Company, issued in May, 1879, due thirty years after date, with interest at the rate of seven per cent. per annum, payable semi-annually, on the first days of June and December of each year, and on which the semi-annual interest due on the first day of December, 1884, amounts to $17,500.

Your petitioners further state that the Wabash, St. Louis and Pacific, for the purpose of increasing its business and revenue, and thereby adding to the value of all lines previously owned and operated by it, acquired by consolidation with the Chicago and Strawn Railway Company, in 1880, what is now known as its Chicago Division, which division extends from Strawn, in the county of Livingston, to the city of Chicago, in the State of Illinois;
382 subject, however, to the payment of the principal and interest of four thousand five hundred (4,500) bonds of one thousand dollars each, secured by a first mortgage thereon, which bonds were issued in July, 1880, due thirty years after their date, with interest at the rate of five per cent. per annum, payable semi-annually, on the first days of January and July in each year, and on which the semi-annual interest due on the first day of July, 1884, is $112,500.

That said company for the same purpose also acquired, in 1880, by consolidation with the Detroit, Butler and St. Louis Railroad Company, a line extending from Butler, in the State of Indiana, to Detroit Junction, in the State of Michigan; subject, however, to the payment of the principal and interest of two thousand and fifty-two (2,052) bonds of one thousand dollars each, secured by first mortgage thereon, which bonds were issued in July, 1881, due forty years after date, with interest at the rate of six per cent. per annum, payable semi-annually, on the first days of January and July in each year, and on which the semi-annual interest due on the first day of July, 1884, amounts to $61,560.

Your petitioners further state that they are advised and believe that each and all of the aforesaid lines of railroad, which were owned or controlled either by the "Wabash Railway Company" or by the "St. Louis, Kansas City and Northern Railway Company," before their consolidation in 1879 under the name of the "Wabash, St. Louis and Pacific Railway Company," together with the aforesaid Chicago and Strawn railroad, which was subsequently acquired, in the manner hereinbefore recited, have at all times during the five years last past, or ever since their construction, earned more than enough to pay all their operating expenses, the cost of main-
383 tenance, and interest upon the *the* several series of bonds above described, and respectively secured upon them by the mortgages or deeds of trust aforesaid.

Your petitioners state that while they are informed and believe that the earnings of the line of railroad extending from Logansport, in the State of Indiana, to Butler, in said State, and known as the Eel River railroad, have not been sufficient to pay the operating expenses, the cost of maintenance, and the rental of four per cent. per annum on twenty-seven thousand nine hundred and twenty (27,920) shares of the capital stock of said Eel River Railroad Company, as provided in the lease under which the Wabash, St. Louis

and Pacific Railway Company acquired the same, and while they are further informed and believe that the earnings of the line extending from Butler, in the State of Indiana, to Detroit Junction, in the State of Michigan, have not as yet been sufficient to pay its operating expenses, the cost of maintenance, and interest upon the bonds secured by first mortgage on the same, yet, after the most careful consideration of the matter, they express the opinion that it would not be wise or for the best interests of said company or its several creditors for your petitioners to lose control of said lines, extending as they do to the city of Detroit and there connecting with the systems of railroads reaching eastward therefrom.

Your petitioners further state that the Wabash, St. Louis and Pacific Railway Company, after its organization as aforesaid, acquired by purchase, lease, and consolidation divers other lines of railroads in said States, subject, however, to certain mortgages and deeds of trust previously executed, to secure bonds and other obligations, as follows, to wit:

1st. The Quincy, Missouri and Pacific railroad, subject to
384 a mortgage to secure twelve hundred and four (1,204) bonds of one thousand dollars each, known as the first-mortgage bonds of said Quincy, Missouri and Pacific Railroad Company, issued in October, 1879, due thirty years after date, and bearing interest at the rate of six per cent. per annum, payable semi-annually, on the first days of January and July in each year, and on which the interest falling due on the first day of July, 1884, amounts to the sum of $36,120.00.

2d. The Indianapolis, Peru and Chicago railroad, subject to a mortgage executed to secure two hundred and seventy-five (275) bonds of one thousand dollars each, known as the first-mortgage bonds of said Indianapolis, Peru and Chicago Railroad Company, issued in July, 1871, due twenty years after date, and bearing interest at the rate of seven per cent. per annum, payable semi-annually, on the first days of January and July in each year, and on which the interest falling due on said first day of July amounts to $9,625.00.

3d. The Chicago, Cincinnati and Louisville railroad, subject to mortgage executed to secure one thousand (1,000) bonds of one thousand dollars each, known as the first-mortgage bonds of said Chicago, Cincinnati and Louisville Railroad Company, issued in January, 1867, due twenty years after date, and bearing interest at the rate of seven per cent. per annum, payable semi-annually, on the first days of January and July in each year, and on which the interest falling due on said first day of July amounts to $35,000.

4th. The Toledo, Peoria and Western railroad, subject to a mortgage executed to secure forty-five hundred (4,500) bonds of one thousand dollars each, known as the first-mortgage bonds of said Toledo, Peoria and Western Railroad Company, issued May 22, 1880, due May 1, 1907, and bearing interest at the rate of seven per
385 cent. per annum, payable quarterly, on the first days of January, April, July, and October in each year, and on which the interest falling due on said first day of July is the sum of $78,750.

5th. The Toledo, Peoria and Western, subject to a mortgage exe-

cuted to secure eleven hundred and eighty-nine (1,189) bonds of one thousand dollars each, known as the preferred income first-mortgage bonds of said Toledo, Peoria and Western Railroad Company, issued ——, 188–, due in — years after date, and bearing interest at the rate of four per cent. per annum, payable semi-annually, on the first days of January and July in each year, and on which the interest falling due on said first day of July amounts to $23,780.

6th. The Havana, Rantoul and Eastern railroad, subject to a mortgage executed to secure three hundred (300) bonds of one thousand dollars each, known as the first-mortgage bonds of said Havana, Rantoul and Eastern Railroad Company, issued in July, 1879, due in July, 1897, and bearing interest at the rate of seven per cent. per annum, payable semi-annually, on the first days of January and July in each year, and on which the interest falling due on said first day of July amounts to $10,500.

7th. The Centerville, Moravia and Albia railroad, subject to a mortgage executed to secure four hundred (400) bonds of one thousand dollars each, known as the first-mortgage bonds of said Centerville, Moravia and Albia Railroad Company, issued in ——, 188–, due — years after date, bearing interest at the rate of six per cent. per annum, payable semi-annually, on the first days of January and July in each year, and on which the interest falling due on said first day of July is the sum of $12,000.

386 8th. What is known as the Cairo Division, subject to a mortgage executed to secure thirty-eight hundred and fifty-seven (3,857) bonds of one thousand dollars each, known as the first-mortgage bonds of said Cairo Division, issued in October, 1881, due fifty years after date, with interest at the rate of five per cent. per annum, payable semi-annually, on the first days of January and July in each year, and on which the interest falling due on said first day of July amounts to $96,425.

9th. The Champaign, Havana and Western railroad, subject to a mortgage executed to secure thirty-four hundred and nine (3,409) bonds of one hundred dollars each, known as the first-mortgage bonds of said Champaign, Havana and Western Railroad Company, issued in ——, 188–, due — years after date, and bearing interest at the rate of seven per cent. per annum, payable semi-annually, on the first days of January and July in each year, and on which the interest falling due on said first day of July amounts to $11,931.50.

10th. What is known as the Iowa Division of said railroad, subject to a mortgage executed to secure twenty-two hundred and sixty-nine (2,269) bonds of one thousand dollars each, secured by first mortgage on said Iowa Division, issued in March, 1881, due forty years after date, with interest at the rate of six per cent. per annum, payable semi-annually, on the first days of March and September in each year, and on which the interest falling due on the first day of September, 1884, amounts to $68,070.

Your petitioners further state that they are informed and believe that the earnings of none of the lines or divisions last above described have at any time since their acquisition been sufficient to

pay their operating expenses, the cost of their maintenance,
387 and interest on the several series of bonds and other obligations above described and secured upon each of them respectively by mortgage or deeds of trust.

Your petitioners further state that from the incoming rents and profits of the property now in their possession under a former order of this honorable court, they believe they can, until otherwise directed, pay all the expenses of operating the same, the cost of maintenance, and all interest from time to time maturing on all bonds or other obligations secured by mortgage or deeds of trust on the several lines or divisions thereof that were owned or possessed either by the "Wabash Railway Company" or by the "St. Louis, Kansas City and Northern Railway Company" before their consolidation, as aforesaid, under the name of the "Wabash, St. Louis and Pacific Railway Company."

Wherefore, inasmuch as the incoming rents and profits from the lines and each of them that were united, as aforesaid, in 1879, by consolidation, as aforesaid, have hitherto been and will, as your petitioners believe, continue to be more than sufficient to pay their operating expenses, the cost of maintenance, and interest on all the aforesaid bonds or other obligations secured upon them or either of them by mortgage or deed of trust; and inasmuch as the existence of said consolidated company as an entirety, with all its rights and franchises, will be preserved and the rights and interests of its several creditors will be best protected and secured by paying from time to time the interest upon the bonds and other obligations secured by mortgage on the several lines and divisions last aforesaid; and inasmuch as the earnings upon the aforesaid Chicago Division
have been and will, as your petitioners believe, continue to
388 be more than sufficient to pay its operating expenses, the cost of maintenance, and all interest on bonds secured thereon by mortgage; and inasmuch as your petitioners believe (for the reasons hereinbefore stated) that it would be a detriment to all said lines and work great injury to said company and all its creditors for your petitioners to lose control of the line extending from Logansport, in the State of Indiana, to Detroit, in the State of Michigan; and inasmuch as the earnings upon the several other lines hereinbefore mentioned as having been acquired by the Wabash, St. Louis and Pacific Railroad Company have not been, and, as your petitioners are informed and believe, will not for the present be, sufficient to pay operating expenses, the cost of maintenance, and interest on the several series of bonds secured by mortgage or deed of trust upon them respectively:

Your petitioners therefore pray for the advice of this honorable court with respect to the several matters following, to wit:

1st. As to whether your petitioners shall, until the further orders of this court, pay the interest as the same from time to time matures upon the bonds or other obligations secured by mortgage on the several lines or divisions of said road at and before the date of the consolidation of the Wabash Railway Company with the St. Louis, Kansas City and Northern Railway Company.

2d. As to whether your petitioners shall, until the further orders of this court, pay the interest upon the bonds secured by mortgage upon what is known as the Chicago Division of said railroad.

3d. As to what they shall do with respect to the payment of rental upon the line extending from Logansport to Butler, in the State of Indiana.

389 4th. As to what they shall do with respect to the payment of interest upon the bonds secured by mortgage on the line extending from Butler, Indiana, to Detroit Junction, in the State of Michigan.

5th. As to how they shall dispose of the earnings and keep the accounts of the earnings and of the operating expenses and cost of maintenance of the several other lines or divisions aforesaid, and which have not and which your petitioners are informed and believe will not for the present be enough to pay their operating expenses, the cost of maintenance, and interest on the several series of bonds secured by mortgage upon them respectively.

SOLON HUMPHREYS AND
THOMAS E. TUTT, *Receivers*,
By WELLS H. BLODGETT, *Solicitor*.

On the 28th day of June, 1884, the master filed his report on said petition; which report was by said court in all things confirmed. Said report is in words and figures as follows, to wit:

390 In the Circuit Court of the United States for the Eastern District of Missouri. March Term, A. D. 1884.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.*, Complainants, *against* THE CENTRAL TRUST COMPANY OF NEW YORK, JAMES Cheney, The Mercantile Trust Company of New York, and Others, Defendants.	In Chancery.

Report of Edmund T. Allen, Special Master, and Order of Court Made Thereon.

1st. Concerning the payment of interest on certain bonds herein mentioned.

2d. Concerning payment of interest on bonds of Chicago Division.

3d. Concerning the keeping of accounts of earnings and expenses of certain lines.

Filed June 28th, 1884.

In the matter of the petition of Solon Humphreys and Thomas E. Tutt, receivers of all the property, rights, and credits of the
391 Wabash, St. Louis and Pacific Railway Company, wherein they pray for the advice of this honorable court with respect to the following, among other matters, to wit:

1st. As to whether they shall, until the further orders of the court,

pay the interest, as the same from time to time matures, upon the bonds or other obligations secured by mortgage on the several lines or divisions of said road at and before the date of the consolidation of the Wabash railway with the St. Louis, Kansas City and Northern railway.

2d. As to whether they shall, until the further orders of this court, pay the interest on the bonds secured by mortgage upon what is known as the Chicago Division of said railroad.

* * * * * * *

5th. As to how they shall dispose of the earnings and keep the accounts of the earnings and of the operating expenses and cost of maintenance of the several other lines or divisions aforesaid, and which have not and which your petitioners are informed and believe will not for the present be enough to pay their operating expenses, the cost of maintenance, and interest on the several series of bonds secured by mortgage upon them respectively.

I beg leave to report that upon the testimony taken before me on the 26th and 27th days of June, 1884 (a transcript of the oral evidence being herewith submitted), I find that the Wabash, St. Louis and Pacific Railway Company was organized on the 10th day of November, 1879, by consolidation of the lines of what was formerly known as the "Wabash Railway Company" (a corporation which previously existed under the laws of Illinois, Indiana, and Ohio) with the line of the St. Louis, Kansas City and Northern
392 Railway Company (a corporation previously existing under the laws of Missouri), and that said companies were at and before the date of their consolidation possessed of certain lines of railroad in the States of Missouri, Iowa, Illinois, Indiana, and Ohio, but which were held by them subject to mortgages and deeds of trust previously executed to secure certain bonds and obligations on parts or divisions thereof.

And I further find that the Wabash, St. Louis and Pacific Railway Company, after its organization, acquired in 1880 what is now known as its Chicago Division, subject, however, to the lien of a certain mortgage previously executed to secure the payment of the principal and interest of forty-five hundred (4,500) bonds of one thousand dollars each, due thirty years after date, with interest at the rate of five per cent. per annum, payable semi-annually, on the first days of January and July in each year, and on which the semi-annual interest due on the first day of July, 1884, is $112,500.

And I further find that all the lines of railroad that were owned or controlled either by the Wabash Railway Company or by the St. Louis, Kansas City and Northern Railway Company, and which are hereinafter mentioned, have ever since their consolidation earned more than enough to pay all the operating expenses, the cost of maintenance, taxes, and interest upon the several series of bonds hereinafter described and secured upon them respectively mortgage or deed of trust, and that the Chicago Division has also, ever since the date of its acquisition by the Wabash, St. Louis and Pacific Railway Company, earned more than enough to pay all its operating expenses, the cost of maintenance, taxes, and interest upon the forty-five hun-

dred (4,500) bonds of one thousand dollars each, secured thereon by mortgage as aforesaid.

393 Wherefore I respectfully recommend that the court make and enter in said cause the following order, to wit:

It is ordered that until otherwise directed the receivers herein, from the incoming rents and profits of said property, after meeting such other obligations as they have been directed to discharge by the former orders of this court, pay from whatever balance may remain in their hands the interest, as the same shall from time to time mature, upon the following bonds or other obligations secured by mortgage on the several lines or divisions of the "Wabash Railway Company" and of the "St. Louis, Kansas City and Northern Railway Company" before the date of their consolidation under the name of the "Wabash, St. Louis and Pacific Railway Company," to wit:

On the first days of January and July (or as soon thereafter as practicable) the semi-annual interest, at seven per cent. per annum, then due, on six thousand (6,000) bonds of one thousand dollars each, issued in 1865 and secured by mortgage upon the North Missouri railroad, amounting to $210,000.00.

The semi-annual interest, at six per cent. per annum, then due, on six hundred and twenty-six (626) bonds of one thousand dollars each, issued in 1878 and secured by mortgage on the St. Louis, Council Bluffs and Omaha railroad, amounting to $18,780.00.

On the first days of February and August (or as soon thereafter as practicable) the semi-annual interest, at six per cent. per annum, then due, on two hundred and sixty-four (264) bonds of one thousand dollars each, issued in July, 1879, and secured by mortgage on the Clarinda and St. Louis railroad (otherwise known as the Clarinda Branch), amounting to $7,920.00.

394 The semi-annual interest, at seven per cent. per annum, then due, on nine hundred bonds of one thousand dollars each, issued in 1853 and secured by mortgage on the Toledo and Illinois railroad, amounting to $31,500.00.

The semi-annual interest, at seven per cent. per annum, then due, on twenty-five hundred (2,500) bonds of one thousand dollars each, issued in 1853 and secured by mortage on the Lake Erie, Wabash and St. Louis railroad, amounting to $87,500.00.

The semi-annual interest, at seven per cent. per annum, then due, on twenty-four hundred and ninety-six (2,496) bonds of one thousand dollars each, issued in 1863 and secured by mortgage on what is known as the Great Western railroad, amounting to $87,360.00.

The semi-annual interest, at the rate of six per cent. per annum, then due, on three hundred (300) bonds of one thousand dollars each, issued in 1862 and secured by mortgage on the Illinois and Southern Iowa railroad, amounting to $9,000.

The semi-annual interest, at seven per cent per annum, then due, on two thousand seven hundred (2,700) bonds of one thousand dollars each, issued in June, 1869, and secured by mortgage on the Decatur and East St. Louis railroad, amounting to $94,500.00.

On the first days of February, May, August, and November (or as soon thereafter as practicable) the quarterly interest, at seven per

cent. per annum, then due, on two thousand six hundred and ten (2,610) bonds of one thousand dollars each, issued in 1867 and secured by mortgage on the Toledo, Wabash and Western railroad, amounting to $45,675.00.

395 On the first days of February and August (or as soon thereafter as practicable) the semi-annual interest on eleven hundred and thirty-one (1,131) bonds of five hundred dollars each, issued — 1877, known as the Wabash railway funded-debt bonds, amounting to $19,792.50.

The semi-annual interest, at six per cent. per annum, then due, on fourteen hundred and one (1,401) bonds of one thousand dollars each, issued in 1877, known as the Wabash railway funded-debt bonds, graduated, amounting to $42,030.00.

The semi-annual interest, at six per cent. per annum, then due, on six hundred and nine (609) bonds of five hundred dollars each, issued in August, 1878, and secured by mortgage on the Brunswick and Chillicothe railroad, amounting to $9,135.

On the first days of March and September (or as soon thereafter as practicable) the semi-annual interest, at seven per cent. per annum, then due, on three thousand (3,000) bonds of one thousand dollars each, issued in September, 1874, and secured by mortgage on the St. Louis, Kansas City and Northern railroad, amounting to the sum of $105,000.

On the first days of September, October, and November (or as soon thereafter as practicable) the interest, at six per cent. per annum, then due, on the sum of $522,975.50, on what are known as graduated scrip certificates, issued in 1877, secured by mortgage on the Wabash railway, amounting to $11,059.51.

396 On the first days of September, October, and November (or as soon thereafter as practicable) the interest, at seven per cent. per annum, then due, on the sum of $115,385, in certificates of indebtedness, issued in 1877, and secured by mortgage on the Wabash railway, amounting to $2,692.31.

On the first days of April and October (or as soon thereafter as practicable) the semi-annual interest, at seven per cent. per annum, then due, on two thousand (2,000) bonds of one thousand dollars each, issued in May, 1870, and secured by mortgage on the Wabash railway, amounting to $70,000.

The semi-annual interest, at six per cent. per annum, then due, on one thousand (1,000) bonds of one thousand dollars each, issued in 1878, and secured by mortgage on the St. Charles bridge, amounting to $30,000.00.

The semi-annual interest, at seven per cent. per annum, then due, on seven hundred and seventy-seven (777) bonds of five hundred dollars each, issued in 1878, and secured by mortgage on the St. Charles bridge, amounting — $13,597.50.

The semi-annual interest, at seven per cent. per annum, then due, on six hundred and forty-five (645) bonds of five hundred dollars each, issued in 1875, and secured by mortgage on St. Louis, Ottumwa and Cedar Rapids railway, amounting to $11,287.50.

The semi-annual interest, at seven per cent. per annum, then due,

on twenty-three hundred and fifty (2,350) bonds of one thousand dollars each, issued in February, 1879, and secured by mortgage on the Omaha Division of the St. Louis, Kansas City and Northern railway, amounting to $82,250.

On the first days of May and November (or as soon thereafter as practicable) the semi-annual interest, at seven per cent. per
397 annum, then due, on five hundred (500) bonds of one thousand dollars each, issued in 1865, and secured by mortgage on the Quincy and Toledo railroad, amounting to $17,500.00.

The semi-annual interest, at seven per cent. per annum, then due, on one thousand (1,000) bonds of one thousand dollars each, issued in September, 1853, and secured by mortgage on the Toledo and Wabash railroad, amounting to $35,000.00.

The semi-annual interest, at seven per cent. per annum, then due, on fifteen hundred (1,500) bonds of one thousand dollars each, issued in 1858, and secured by mortgage on the Wabash and Western railroad, amounting to $52,500.00.

The semi-annual interest, at seven per cent. per annum, then due, on twenty-five hundred (2,500) bonds of one thousand dollars each, issued in May, 1865, and secured by mortgage on the Great Western railroad of 1859, amounting to $87,500.00.

The semi-annual interest, at seven per cent. per annum, then due, on one hundred (100) bonds of one thousand dollars each, issued in May, 1873, and secured by mortgage on the Boone County and Boonville railroad, amounting to $3,500.00.

On the first days of June and December (or as soon thereafter as practicable) the semi-annual interest, at seven per cent. per annum, then due, on five hundred (500) bonds of one thousand dollars each, issued in May, 1879, and secured by mortgage on the Hannibal and Naples railroad, amounting to $17,500.00.

2d. It is further ordered that, until otherwise directed, the receivers herein, from the incoming rents and profits of said prop-
398 erty, after meeting such other obligations as they have been directed to discharge by the former orders of this court, pay from whatever balance may remain in their hands the semi-annual interest, at the rate of five per cent. per annum, as the same from time to time falls due, on the first days of January and July in each year (or as soon thereafter as practicable), upon the forty-five hundred (4,500) bonds, issued in 1880, secured by mortgage on what is known as the Chicago Division of said railway, and amounting to $112,500.

3d. And it is further ordered that the receivers herein, until otherwise directed, keep the accounts of all the earnings and incomes from as well as the accounts of all the operating expenses, cost of maintenance, and taxes, upon the following lines or divisions of said property separately, to wit:

1. The Detroit, Butler and St. Louis railroad, which extends from Butler, in the State of Indiana, to Detroit Junction, in the State of Michigan.

2. The Eel River railroad, which extends from Logansport to Butler, in the State of Iowa.

3. The Quincy, Missouri and Pacific railroad, commencing at West Quincy and extending to Trenton, in the State of Missouri.

4. The Indianapolis, Peru and Chicago railroad, extending from the city of Indianapolis to Michigan City, in the State of Indiana.

5. The Toledo, Peoria and Western railroad, extending from the State line between the States of Indiana and Illinois to the cities of Hamilton and Warsaw, in the State of Illinois, and Burlington, in the State of Iowa.

399 6. The Havana, Rantoul and Eastern railroad, extending from Williamsport, in the State of Indiana, to Leroy, in the State of Illinois.

7. The Centerville, Moravia and Albia railroad, extending from Centerville to Albia, in the State of Iowa.

8. The Cairo Division, extending from Danville to Cairo, in the State of Illinois.

9. The Champaign, Havana and Western railroad, extending from Urbana to Havana, in the State of Illinois.

10. The Iowa Division, extending from Keokuk to Humeston, in the State of Iowa.

And that said receivers make quarterly reports thereof, showing not only the income and expenses of each of the lines aforesaid, but also the methods by which the incomes and expenses of said lines were respectively ascertained.

EDMUND T. ALLEN,
Special Master.

Report confirmed.

400 *Amended Cross-Bill Filed.*

On the 14th day of October, 1884, there was filed in said cause No. 2357, by leave of court, the amended cross-bill of said The Central Trust Company of New York and James Cheney, trustees, praying substantially the same relief asked in their original cross-bill, filed June 9th, 1884.

On the 13th day of January, 1885, the said The Central Trust Company of New York and James Cheney, trustees, filed in the circuit court in the city of St. Louis, in the State of Missouri, their bill against said Wabash, St. Louis and Pacific Railway Company and others, alleging, in substance, the same facts and praying substantially the same relief as in their cross-bill and amended cross-bill filed in the United States circuit court in cause No. 2357, as hereinbefore set out. On the 10th day of June, 1885, said cause was removed from the State court to the United States circuit court for the eastern district of Missouri and became cause No. 2464 in said last-mentioned court, and said causes No. 2357 and No. 2464 were by said United States circuit court duly consolidated.

On the 20th day of March, 1885, said receivers, Solon Humphreys and Thomas E. Tutt, having called the attention of the court to their report of said date, the following proceedings took place, to wit:

401 In the Circuit Court of the United States for the Eastern District of Missouri. March Term, 1885.

THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, Complainant,
vs.
THE CENTRAL TRUST COMPANY OF NEW YORK and Others, Defendants.

In the matter of the cancellation of certain leases of branch railroads, particularly the St. Joseph and St. Louis railroad.

(After remarks of counsel, Mr. Blodgett, for the receivers.)

The COURT (Treat, J.): The rental has not been paid?

Mr. BLODGETT: No, sir.

The COURT (Treat, J.): And the lessors are parties to this proceeding?

Mr. BLODGETT: Yes.

402 The COURT (Treat, J.): Have they ever appeared?

Mr. BLODGETT: Only one company has appeared and demanded *his* rental, the St. Louis and St. Joseph Company.

The COURT (Treat, J.): You have not paid it?

Mr. BLODGETT: We have not paid it.

The COURT (Treat, J.): And they chose to rest in that condition?

Mr. BLODGETT: Yes; and are unwilling to take their property.

The COURT (Treat, J.): Now you wish to cancel the lease, do you, or hold the party under the lease and not comply with its terms?

Mr. BLODGETT: This lease don't pay; and if the receivers were called on for an expression of opinion I think they would advise that it would be wiser to cancel the leases.

The COURT (Treat, J.): Wouldn't you have to cite them in for that purpose?

Mr. BLODGETT: Yes. The suggestion was that the parties should be required to appear and show cause why we should not either be permitted to cease the operation of these lines or let them be operated at their own expense.

The COURT (Brewer, J.): In other words, that is a proposition which commences the disintegration of the company—that is, throws off the leased lines? The proposition contemplates, as I understand, the throwing off of this leased line?

Mr. BLODGETT: Yes. The Central Trust Company is the
403 holder of the general mortgage bonds; it might come and say, "We think these lines are some security for the bonds we represent;" and the court might say, "If you take that view, and you think these leases are any security for the bonds you represent, perhaps your bondholders will provide the money with which to operate these lines; if you think so, why, you may have sixty days to make up your minds, or, if you will do otherwise, you will go out."

* * * * * * *

The COURT (Brewer, J.): Your report shows the gross earnings from these different branches?

Mr. BLODGETT: The report shows the main lines are earning enough to pay their interest and operating expenses, but nothing beyond that, perhaps $68,000 in excess, so that it is not possible for the thing to drift in this way, except to pay the rentals of these lines from any excess of earnings on the main line, because the total gross earnings on the main line have not been sufficient to discharge the deficit on some single lines.

The COURT (Treat, J.): I have been anticipating that we should reach this point some time. The difficulty is a legal one as well as one of fact. This general mortgage covers all these leased lines, as you say. The bondholders under that mortgage, as you have intimated, have a right to the benefit of these leases, but the leases, instead of being a benefit, as the figures show, are a burden. Now, the lessor has chosen to make a lease, and this corporation is bound to pay the rentals. It is not advantageous to you possibly or to the holders of this general mortgage that you do go on with it, but what are we do with the rights of these parties?

This corporation, the Wabash Company, is just as much
404 bound to pay its rentals by the terms of its contract as it is bound (I am speaking legally) to pay the interest on this general mortgage. Of course, prior in right to the general mortgage are these underlying mortgages. They must be cared for, being prior in right. Now, we strike a point where disintegration begins. Who are concerned in it? The lessor may come in and say, I wish you to continue to do what you contracted to do for my line and operate that road. You say you cannot do it. Well, what will the lessor do—hold you to your contract, or what?

Mr. BLODGETT: That is the matter that concerns us.

The COURT (Treat, J.): And it concerns the lessor equally. We have got to reach the very grave question here of disintegration.

The COURT (Brewer, J.): In order to get to a determination of that question ought not specific notice to be given both to the mortgagees in the general mortgage and the mortgagees on the separate divisions that an application is now presented to the court either to cancel the leases, surrender these roads, or adjust the relations between the holders of the prior mortgages on the divisions and the general mortgage on the Wabash, in order that each may come and say to the court what their interests are, what they claim, and then when their interests are presented the court may make such order as may be proper in the premises?

(After remarks by Mr. Newton Crane, representing the St. Louis & St. Joseph railroad.)

The COURT (Brewer, J., orally): You have suggested here that certain branches were not paying operating expenses, independent of the rent agreed upon, and asked the advice of the court as
405 to what the receivers should do. It seems to us that a preliminary step is this: I do not think there is vested in the court the power of absolutely cancelling the leases, setting them

aside, and disposing of the rights of parties. For instance, this St. Joseph Branch which Mr. Crane represents. It has a contract which calls for the payment of a certain amount. It is a valid contract, as far as anything now appears, binding on the Wabash and binding on it. It turns out to be not profitable to the Wabash, as you say. I do not think that the court can say we will cancel this lease because it is not profitable. A man has to stand many a contract he makes which is not profitable to himself. Perhaps the Wabash has made with these branch roads many contracts unprofitable, but if the contracts are made, and made in good faith, parties are bound by those contracts. The court, simply because you, the road, *is* in possession of the court, cannot say we will abrogate these contracts. We have no omnipotent, parliamentary power in this matter that we can set aside anything which is not profitable to the Wabash. It seems to us preliminary to anything of the kind that the receivers should suggest by a proposition here that this or that branch is not profitable; that the liability which the Wabash road has incurred is unfortunate for the road, entailing obligations upon it which are unsatisfactory, and making certain proposals in reference to the cancellation of that lease, and that that proposition should be presented specifically to the lessor and its mortgagees so that they can come before us upon a specific notice. In a certain general, though limited, sense the branch roads and the parties interested are parties to the proceedings in this court, and that is true for the ordinary operations of the road; but when you come to a proposition which says you want to cancel a lease and shut out a branch, that you want relief from any and all obligations to it, it seems to us that it is absolutely indispensable that the
406 Wabash, through their receivers, should make a statement of facts and couple it with a proposition which they think is reasonable and submit that to the branch road, and then upon that statement and notice submit that question to this court so that the court can hear such branch road with all its claims. It may insist upon the validity of its contract, and insist upon that contract as a contract which is still binding; or it may say, "We consent to a surrender of the lease, the abrogation of it upon certain terms, and in that way avoid any further responsibility." We are disinclined to act until there is a specific notice so that the road itself, the lessor, and the parties interested can say, "We have notice of this proposition." Then come before the court and make your showing, and the court will do that which is right as between the lessor and the lessee in the premises. This is not one of those things which comes along in the line of the general operation of the road of which everybody is bound to take notice. It is a specific matter and separate proceeding as to which each party requires special notice.

Mr. BLODGETT: Can't the report be referred to the master with instructions for him to report upon such lines as he would recommend should be notified that it is necessary to make such changes in respect to the matter?

The COURT (Brewer, J.): And after the report of the master that

notice should be given to the lessor and all parties in interest under the general mortgage?

Mr. BLODGETT: Yes.

The COURT (Brewer, J.): I should think that would bring it up fairly before us.

Mr. BLODGETT: It was not expected that the court would make any order to-day, but it was only to bring the matter imme-
407 diately before the court, because this is a matter of considerable importance, especially if it is held and shall finally be held that these rentals become charges upon these lines that pay, or the main line or original company, and that these claims underrun the mortgages on these lines.

The COURT (Brewer, J.): Of course, it involves in that two questions—first, whether the lease itself is a valid obligation and a charge upon the road prior to the mortgage; and, if so, second, whether, the lease proving valueless to the Wabash road, the lessor or the lessee can adjust and compromise by a surrender of the lease upon satisfactory terms.

The COURT (Treat, J.): That goes a little further. I do not know to what purpose the receivers have been applying the proceeds of any of the receivers' certificate that have been issued.

Mr. BLODGETT: We have issued about $350,000, and applied them to the payment of the labor liens and supply liens.

The COURT (Treat, J.): On branches as well as the leases?

Mr. BLODGETT: Yes; generally; that were contracted prior to the receivership.

The COURT (Treat, J.): Yes, and there comes another difficulty. I mention it to show how complicated the matter is. Take the St. Joe road for illustration; it has fallen behind all the while, spending money, taking the general funds of this system to keep up a concern that is valueless to the general system, and we are issuing certificates. Well, a certificate of the receivers authorized by
408 the court, unrestricted by its terms, underlies everything, and should be restricted specially to specific purposes. Hence it becomes very important that those who have underlying mortgages; for instance, the old North Missouri, which is a paying concern, where the interest is being paid constantly and where there is a surplus—as to what is to become of the surplus and the effect of certificates. It seems, taking the Wabash as a whole, it does not pay the rentals and operating expenses on all these branches, etc., and that these barnacles are deteriorating the general system. As Judge Brewer has said, each one stands on its own merits, to wit, Mr. Crane's client may come in and say, "You covenanted that you would give us so much rental; you undertook to keep it a going concern, whereby we might be connected with the outside world. We want this connection from Lexington and St. Joe, and so with the whole general system, as a link." That was the main consideration in making the lease. Now they are cited in here. Suppose that the lessor says, "We will forego the rentals and agree to a condition of affairs whereby this shall be continued a going concern, not expensive to the general system." We do not know but that they

may have some propositions to make of that kind. Then, again, as already suggested by Judge Brewer, the general mortgage creditors may say, "We do not wish to lose this leased road, and we are willing to stand the expense ourselves."

The COURT (Judge Brewer): As we anticipated when this thing first started, we find a good deal of difficulty about this matter, and we will have to go slowly. A good many interests and questions are involved. Take the St. Joseph for example. According to the statement made, the gross receipts do not pay the operating expenses. In other words, the Wabash, to operate that rented road, must pay a certain amount for operating expenses over and above
409 the receipts. Beyond that it has to pay its rental. It would seem wiser for the Wabash to drop the road and pay simply the rental than to pay the rental and the difference between the operating expenses and the receipts. If the operating expenses are $30,000 or $40,000 above the receipts and the rental $30,000 or $40,000 more, it would seem a matter of business prudence to pay the rental $30,000 or $40,000 and let the road be idle. Still there may be questions beyond that. The business passed over that road may inure to the benefit of the general receipts of the Wabash proper. These considerations are problematical. Whatever is done in reference to that lease, as I suggested a few minutes ago, is outside of the ordinary operations of the road, in respect to which it may be presumed that all parties who are parties to the suit are present in court and must abide by the orders of the court. But this involves the termination of that lease or an adjustment of the claims of the lessor as against the Wabash road. There are several parties interested in that. The Wabash Company itself, represented by the receivers, of course is interested, because while to-day the operating expenses of that branch may be in excess of the receipts, to-morrow they may be the reverse. No order should be made without the consent or without the presence of the Wabash road itself, the lessee, in the court, responding to that inquiry. The mortgagee under the general mortgage, the Central Trust Company, should be here responding to the inquiry, because, as a mortgagee, it has a lien upon this branch, with all the possibility of earning, whatever those may be. I may say, "Clearly to-day this branch does not pay; to-morrow it will. As mortgagee I prefer to take the chances. I do not want to release the lien which I have upon this branch. I prefer to pay a deficit to-day in the hope of a profit to-morrow." The lessor, the St. Joseph Branch, in the case before us may say, "I have made a con-
410 tract with the Wabash for a specific sum. I do not propose to give that contract up. Whether the Wabash makes or loses by operating my road is immaterial. I have a specific contract and I propose to rest upon that." It should be heard. The mortgagee, if there should be such, upon the lessor, the St. Joseph Branch, is equally interested because the payment of interest on its mortgage, the value of its mortgage, depends upon the rental, the profit made from operating this branch. It should be heard. It seems to us, therefore, before any order is made involving the termination or the continuance of that lease or any rearrangement between the

parties, that all parties in interest should be specifically notified that application will be made to the court for the absolute termination of the lease, or a termination upon condition, so that every party may come here and state its claims and all be heard.

Of course this court, with the vast amount of business before it and consequent inability to look after details, has to depend upon its officers; and the master, to whom this matter has been referred, should come before us with a statement, accompanying any proposition, of the gross receipts from this branch, and the gross expenses, showing how much of the business over this branch passes on to the main line and thus inures to the benefit of the main line, and also all other material facts, so that we can look at the matter in the light of all the facts bearing upon that case. It seems to us that the proper way is for the receivers to give specific notice to all these various parties in interest of what, in their judgment, should be done and what application which, as receivers representing the road, they desire to make, of course giving ample time to them to respond; and then that the master should be directed to make specific reports as to the receipts, the expenses, and the character of the busi-
411 ness as affecting the main line. In that way we can, if the parties do not agree upon any proper order, make an order which shall respond not merely to the interests of the Wabash, but to the rights of the general mortgagee of this entire system and to the rights of the lessor and the rights of the mortgagee of the lessor. We think we should not make any order of any kind to-day except simply that all parties in interest should be notified specifically of any application of the kind suggested.

* * * * * * *

The COURT (Judge Brewer): We wish to say, in the first instance, we have no question but that the receivers we appointed were the proper men to appoint, and we have seen nothing in our experience in the last ten months to cause us to change our opinion. They have done the best they could, and are doing the best they can to-day in the administration of that road, and we have no suggestions to make in respect to their actions.

Mr. CRANE: Certainly; I did not intend to reflect upon them in any manner.

The COURT (Brewer, J.): I wish to say that my brother Treat and myself are both anxious to have these receiverships terminated as speedily as possible, and if you can give notice so as to have these matters brought up within a reasonable time, so as not to protract the general proceedings in any manner, it will be a kindness to ourselves and to all parties interested. Personally, I shall be here probably until the 16th of April, and would be glad to have you bring the matter up, if possible, on the 13th of April, and that will enable you to bring it before both of us.

The COURT (Treat, J.): I have indicated the form of a notice which outlines my idea with respect to each one of these
412 branches to this effect: "Take notice that the undersigned receivers, etc., have this day"—that is, the date of filing your report to the court—" reported to the court that the gross receipts are

so much, the net receipts so much, and the deficit so much, and that on the 13th day of April next application will be made to the court for a cancellation of the lease and a surrender of the leased property" (that is the idea, not giving the words), "and for such other action in respect thereto as the case may require, in justice to all parties concerned."

413 Notice that a report has been filed and a hearing thereon would be had on April 13, 1885, was duly served on the solicitors of intervenor, said notice being as follows, to wit:

Notice of Hearing of Motion.

In the Circuit Court of the United States for the Eastern District of Missouri.

THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants, *vs.* THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.*, Defendants.	Consolidated Cause. In Chancery.

To the St. Joseph and St. Louis Railroad Company:

Please take notice that on the 20th day of March, 1885, the undersigned receivers in said cause filed in said court their report, showing that for the period commencing May 29th and ending November 30th, 1884, the earnings of said St. Joseph and St. Louis railroad were as follows:

Gross earnings	$83,644 27	
Other credits	636 91	
		$84,281 18
Operating expenses	130,766 60	
Other debits, including six months' taxes	4,694 67	
Proportion of car-trust interest	938 74	
Rental (30 per cent. gross earning)	25,093 26	
		161,493 27
Deficit		$77,212 09

The expenses of the line (not including any charge for rental) have therefore exceeded its earnings $52,118.83.

Your are further notified that on Monday, the 13th day of April, 1885, or as soon thereafter as we can be heard, we will
414 apply to said court for instructions concerning a cancellation of the lease entered into on or about the 1st day of June, 1874, between the St. Joseph and St. Louis Railroad Company, of the first part, and the St. Louis, Kansas City and Northern Railway Company, of the second part, and a surrender by us of said leased property to whomsoever the court may direct, and for such other and further orders with respect thereto as the facts may require in justice to all the parties concerned.

SOLON HUMPHREYS,
THOMAS E. TUTT, *Receivers.*

On the 13th day of April, 1885, hearing was has, and on the 16th of said month an opinion was delivered by said court, which opinion said court after- directed to be entered as an order in said cause, and it was so entered accordingly. Said opinion is as follows, to wit:

415 In the Circuit Court of the United States for the Eastern District of Missouri. March Term, 1885.

CENTRAL TRUST CO. OF NEW YORK *et al.*
vs.
THE WABASH, ST. LOUIS & PACIFIC R'Y CO. *et al.*
and
WABASH, ST. LOUIS & PACIFIC RAILWAY CO.
vs.
THE CENTRAL TRUST CO. OF NEW YORK *et al.*

Nos. 2357 and 2464. Consolidated Cause.

Opinion, April 16, 1885.

BREWER, *J.* (orally):

Several questions have been presented to us the last few days, concerning which we have come to a conclusion, and perhaps we had better dispose of those before proceeding with the hearing of other matters.

I might preface what I have to say in reference to the legal questions involved with the remark that this court is in very much
416 the condition of that successful but unfortunate holder of a lottery ticket to whom the first prize of an elephant was awarded. The prize was vast and valuable, but the ever-recurring conundrum was "What to do with it?" And this Wabash road comes to us with ever-recurring and difficult questions.

In reference to the Cairo Division, in which an order was presented to us day before yesterday, we have passed that order, with this addition:

"And it is further ordered that the receivers appear to said cause pending in said circuit court for the southern district of Illinois and present any demand that they may have as said receivers against said property known as the Cairo Division for operating or other expenses, and also for the proportion of the receivers' certificates issued under the orders of this court for which said property may be justly chargeable in law or in equity."

That is, we pass it with the idea that while jurisdiction is retained in this court for ultimate orders, it is better that that court, in the first instance, pass on the amount of receivers' certificates or operating expenses justly chargeable to the Cairo Division and include such amount in the foreclosure decree which shall be entered.

Mr. GREEN: I think a blank was left at the time when the surrender should be made. That might be filled up by inserting the words "ten days."

Mr. TAUSSIG: We prefer that should be a matter of consultation. There are two blanks—one in reference to the present surrender and the other in reference to the rolling stock.

417 TREAT, J.: The first blank is the time the receivers shall turn over the road to the trustees. How long a time do you wish for that?

Mr. GREEN: Ten days.

TREAT, J.: Now, in reference to the rolling stock which, I suppose, is scattered all over the country?

Mr. GEEEN: Say sixty days. I think that will be satisfactory.

TREAT, J.: It cannot be very well done before that. The cars belonging to this division may be scattered from one end of the country to the other and will have to be brought in.

Mr. GREEN: Of course we will surrender all we have now at once.

Mr. ——: I understand that the rolling stock is not to be taken off the road; in other words, that we are not to be left entirely without rolling stock.

Mr. GREEN: Oh, certainly not.

Mr. TAUSSIG: We will fill the blank after consultation.

BREWER, J. (orally): Now, recurring to the general questions that are presented, we name some half dozen matters which we think should be placed in the form of an order or orders, and let me preface them with a brief statement:

This Wabash road is composed of many subdivisions. While it is a single corporation to-day, yet into it have passed many
418 corporations and many separate railroad properties. In administering such a consolidated property the court must look at not merely the interest of the mortgagee in this general mortgage or of the mortgagor as a single entity or corporation, but also the separate and sometimes conflicting interests of the various subdivisions and their respective encumbrances, and back of all that the duty which every railroad corporation owes to the public; for underlying the rule which the Supreme Court has laid down in respect to the payment by receivers when they take possession of railroad property of prior unsecured debts recently accrued runs the thought, as expressed by the Supreme Court, that a railroad corporation owes a duty to the public, which has given it its franchise and enabled it to construct its road, the duty of operating that road for the benefit of the public. While that may not be what you may call an absolute duty, enforcible under all circumstances, it is still a duty to be regarded and enforced by the courts when they take possession of railroads through their officers; and that duty is not limited to the operation of merely that particular fragment of a road which is pecuniarily profitable in its operations, but it extends to the road as an entirety and to all its branches, all its parts, differing in that particular from the duty which would rest upon the court if it had simply taken possession of property used for private purposes, manufacturing or otherwise, where the single question might well be said to be one of pecuniary profit. This Wabash road as a system was in operation, a going concern from one end to the other, as such discharging its duties as best it could to its various creditors. This court, at the instance of the corporation and to preserve the integrity of this system, took possession of it by its receivers. It took posses-

sion of it as a going concern, and so far as is reasonable and practicable it should continue it as a going concern until it surrenders it to whoever may be the purchasers or future holders of it.

419 With that preface, and calling these separate branches which have passed into this consolidated road subdivisions, since some have passed in by way of lease and others by way of consolidation, subject to separate mortgage, we pass orders substantially as follows:

The first is one which has already been entered, and we simply emphasize, by repeating it, that subdivisional accounts must be kept separately. That was an order passed by Brother Treat at the very outset of this receivership, in order that the particular equities of each one of these divisions, as between themselves, might be ascertained.

2. Where any subdivision earns a surplus over expenses the rental or subdivisional interest will be paid to the extent of the surplus, and only to the extent of the surplus. Any past diversion of such surplus for general operating expenses will be made good at once and, if need be, by the issue of receivers' certificates. Thus, for illustration, this Toledo, Peoria and Western railroad appears by the report to have been earning a surplus over its operating expenses. That surplus is not the full rental price, and even that has not been paid to the lessor, having been used for general operating expenses. Any net earnings should be paid over to the lessor or, if there be a subdivisional mortgage, to the mortgagee, and any such diversion as that should be made good and made at once. At the inception of this receivership an order was passed authorizing the issue of two million dollars receivers' certificates for the payment of such amount of prior debts for labor and material. Those have been partially paid and without the issue of all of the certificates authorized, only a half a million having been issued. The receivers, hoping, doubtless, that the business of the road would continue to be such that they need not issue more than half a million re-

420 ceivers' certificates, have diverted funds which should be applied to the payment of these rents to the payment partially of this past indebtedness. To that extent the diversion should be restored.

3. Where a subdivision earns no surplus—simply pays operating expenses—no rent or subdivisional interest will be paid. If the lessor or the subdivisional mortgagee desires possession or foreclosure he may proceed at once to assert his rights. While the court will continue to operate such subdivision until some application be made, yet the right of a lessor or mortgagee whose rent or interest is unpaid to insist upon possession or foreclosure will be promptly recognized.

That, it is true, may work a disruption of the system, as evidenced by the movement just made in respect to this Cairo Division, but the proceeding for disruption will come from the subdivisions. The court is not sloughing off branches—tearing the system in two—but the disruption, if it comes, will come from those who seek separation and have legal right to so do.

4th. Where a subdivision not only earns no surplus but fails to pay operating expenses, as in the St. Joseph and St. Louis Branch, the operation of the subdivision will be continued, but the extent of that operation will be reduced with an unsparing, though a discriminating, hand—that is, if a subdivision does not earn operating expenses and the receivers are running two trains a day, then lop one of them off. If they are running one train a day and still it does not pay, then run one train in two days. While the court will endeavor to keep that subdivision in operation, it will be made the burden of it to the consolidated corporation and to all the other interests put into that consolidated corporation a minimum.
421 We have used the term "with an unsparing, but a discriminating hand." By this we mean that certain things must be left to the discretion of the receivers. It may be that running one mixed train, proffering slight accommodation to the traveling public, would work a greater deficit than two trains, one furnishing the conveniences of a passenger train and the other purely a freight train. That must be left to the discretion of the receivers. The court is not in a position to determine as to what in any particular case will be most likely to work out a minimum deficit. If there is any controversy hereafter arising under the management of the receivers respecting any reduction, why all the parties interested can apply to the court.

Some of these branches across the river seem, upon the map at least, to be so situated in respect to connections that a limited number of trains would answer all the real demands of the public, and that they would be operated with a very slight expense. Suppose, as of course it may be expected, there will continue to be a deficiency in the operating expenses of such subdivisions, such deficiency will be paid out of the general earnings of the consolidated road, or, if need be, by the issue of receivers' certificates.

While we are, both of us, loath to go into the receivers' certificate business, and do as little of it as is reasonably possible for a court having such large properties in its hands, yet in such a case we think the emergency arises. Suppose we take possession of a single short line (and we have in one or two other cases), the continuance of that as a going concern is emphasized more than once by the Supreme Court as a duty, as a reason for paying prior indebtedness, and also as a reason for issuing receivers' certificates. Stop operating it and it becomes a dead concern; its connections are broken up, and its value is impaired. Therefore, to preserve that value,
422 the courts have said that it is right, in a limited degree, to issue receivers' certificates; and if that be true where the court has but a single line it is equally true where it has a road with various branches, and as to all of those branches. The value of any branch abandoned is diminished, and the court may not consider simply the interests of the consolidated company, the mortgagor, and the trust company, the mortgagee. It is bound to regard the interests of each one of these subdivisions that went into the consolidated company, and thus into the receivers' hands; and if the court may and ought to issue receivers' certificates in order to

keep a single line a going concern, so, having possession of this system, with its various branches, for the same reason and by the same means, it should keep each one of them in operation.

There will be no modification of the order heretofore entered concerning receivers' certificates, but all equities respecting them, as between the various subdivisions, will be adjusted in the final decree. There may be, as counsel strenuously urged yesterday, a great many equities as between the various subdivisions in respect to the final burden of these receivers' certificates; but they have been authorized for only such claims as, if no receivers' certificates had been issued and the road not taken possession of by the court, could have been cast into liens prior to all mortgages upon the road and all its branches; any single labor or material claim could have been cast into a lien which would have been a first lien on the North Missouri road, a lien antecedent to all its mortgages, and there is no impropriety in substituting receivers' certificates for that kind of claim. It simply puts it on the same basis as the claim stood before the certificate was issued. When it comes to a sale of the road or other final disposition of the matter it may be there will be such equities as will justify the casting of the burden of these certificates
423 upon one subdivision rather than another. If the road goes into a single sale as an entirety, the purchaser has got to take the burden of these receivers' certificates, and before the court passes the road out of its hands the receivers' certificates will be paid.

Application also is made for the reappointment of receivers, or, as stated in the language of the motion, for extending the receivership to the trust company, the mortgagee in the general mortgage. I confess that I do not wholly understand why such an order as that is asked, and I cannot appreciate what counsel mean when they say make the receivers receivers for the trust company, the mortgagee.

As we look upon it, the receivers are not receivers for either party. They are simply the hand of the court. In the process of the litigation the court has taken possession of the property and holds it, neither for the mortgagor nor the mortgagee, and it matters not for the ultimate determination of the suit at whose instance the receivers were appointed. They act for neither party. They represent neither party. They stand here simply as the hand of the court, holding the property for disposition at the end of the litigation, for the benefit of all.

So I cannot see what can be gained as a legal proposition by a new order of appointment extending the receivership, as counsel say, to the trust company, the mortgagee. The receivers will have no greater power, no different power, would owe no different duty, and would be no more and no less subject to the orders of this court than they are now, and certainly they would have no right in the operation of their trust to extend favors to the one side or the other.

424 Furthermore, as receivers, appointed at the instance of the mortgagor, in the first instance, they took possession of the entire properties, while this order, as tendered, contemplates a seiz-

ure of a part only of these properties—not all. Having taken possession of the road under the idea, in the first instance, that the integrity of the system had a value and should be preserved, it seems to us the receivership should continue right along in that line. There will be no reappointment of the receivers.

The motion of Mr. Hagerman, representing certain bondholders of the Toledo, Peoria and Western Railroad Company, must be overruled. We cannot turn the road over to the bondholders or force it upon trustees if they do not come here and ask for it. Partially, of course, the motion accomplishes its purpose, in that the order will pass, as stated above, for paying over the surplus earnings as rent to the corporation.

I believe that minutes all the matters concerning which we have come to a conclusion. My brother Treat may wish to emphasize some portions of it.

TREAT, J.: I think you have covered all the points.

On Sept. 20, 1884, said receivers presented to the court a petition for instructions with respect to the payment of interest on certain bonds secured by mortgage on that portion of the Wabash system known as the Havana Division, which petition was in words and figures as follows:

425 In the Circuit Court of the United States for the Eastern District of Missouri. September Term, A. D. 1884.

THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, Complainant,
against
THE CENTRAL TRUST COMPANY OF NEW YORK, JAMES CHENEY, The Mercantile Trust Company of New York, and Others, Defendants.

Solon Humphreys and Thomas E. Tutt, receivers.

Petition of Receivers for Instructions as to Interest Due on Bonds of the Havana, Champaign and Western Division. Filed September 20, 1884.

Now come Solon Humphreys and Thomas E. Tutt, receivers of the Wabash, St. Louis and Pacific railway, and respectfully state and show unto the court that heretofore, to wit, on the 31st day of March, 1880, the Champaign, Havana and Western Railway
426 Company, a corporation organized and existing under the laws of the State of Illinois and owning a railroad wholly within said State, commencing at the city of Champaign, in the county of Champaign, and extending from thence to the town of White Heath, in the county of Piatt, and from thence by way of Clinton, in the county of De Witt; Lincoln, in the county of Logan; Macon City, in the county of Macon, to Havana, in said Macon county, together with a branch commencing at said town of White Heath and extending from thence through Monticello, in said county

of Piatt, to the city of Macon, in the county of Macon, and being altogether about one hundred and thirty-one (131) miles, more or less, in length, was, together with all its other property and franchises, duly and in all respects according to the laws of the State of Illinois consolidated with the Wabash, St. Louis and Pacific Railway Company, and thereupon the same became from thenceforth a part of the system of railroads owned and (until the appointment of your petitioners as receivers herein) operated by said Wabash, St. Louis and Pacific Railway Company; that afterwards, to wit, on the 1st day of December, 1880, the said Wabash, St. Louis and Pacific Railway Company, by its deed of that date, conveyed to Henry F. Spaulding and John T. Terry all the railroad above described, together with all its appurtenances, in trust to secure the payment of the principal and interest of one thousand six hundred bonds of one thousand dollars each, dated on the said 1st day of December, 1880, payable thirty years after date, with interest at the rate of six per cent. per annum, payable semi-annually, on the first days of June and December in each year; but your petitioners state, upon information and belief, that only one thousand two hundred and ten of the aforesaid bonds have been issued.

Your petitioners further show that previously, to wit, on
427 the first day of July, 1879, the said Champaign, Havana and Western Railway Company had executed its deed of trust to Henry W. Ford and Richard S. Brock, conveying to them in trust the entire railway and property above described to secure the payment of the principal and interest of three hundred and fifty thousand dollars ($350,000.00) in the "first-mortgage preferred bonds" of said company, bearing date on the said first day of July, 1879, and one million one hundred thousand dollars in what are known as the "first-mortgage common bonds" of said company, which said "first-mortgage preferred bonds" fall due thirty years after date and bear interest at the rate of seven per cent. per annum, payable semi-annually, on the first days of January and July in each year.

And your petitioners state, upon information and belief, that the above-mentioned "first-mortgage preferred bonds," to the amount of three hundred and fifty thousand dollars ($350,000.00), is all the indebtedness of said Champaign, Havana and Western Railway Company now outstanding and secured by said mortgage of July 1st, 1879, thereby making the total indebtedness now secured by the two mortgages aforesaid on the lines of said Champaign, Havana and Western railway, as above described, one million five hundred and sixty thousand dollars, of which sum one million two hundred and ten thousand dollars bears interest at the rate of six per cent., and three hundred and fifty thousand dollars thereof bears interest at the rate of seven per cent., making the total interest annually due on said indebtedness the sum of ninety-seven thousand one hundred dollars ($97,100.00), of which sum twelve thousand two hundred and and fifty dollars ($12,250.00) falls due on the first day of January; thirty-six thousand three hundred dollars ($36,300.00) falls due on the first day of June; twelve thousand two hundred and fifty dol-

lars ($12,250.00) on the first day of July, and the sum of
428 thirty-six thousand three hundred dollars ($36,300.00) on the first day of December in each year.

Your petitioners further state that on or about the 1st day of June, 1880, the said Wabash, St. Louis and Pacific Railway Company executed its bonds in the sum of fifty million dollars ($50,000,000.00), falling due on the 1st day of June, 1920, with interest from date at the rate of six per cent. per annum, payable semi-annually, on the first days of June and December in each year, which bonds are known as the "general mortgage bonds" of said Wabash, St. Louis and Pacific Railway Company, and that to secure the payment of the principal and interest thereof said Wabash, St. Louis and Pacific Railway Company on said first day of June, 1880, executed and delivered to the Central Trust Company of New York and James Cheney, of the State of Indiana, a certain indenture of mortgage, known as the "general mortgage," wherein it conveyed to said trustees for the purposes aforesaid all of the railroad hereinbefore described, together with its interest in all the other lines of railroad owned or operated by it in the States of Missouri, Iowa, Illinois, Indiana, Ohio, and Michigan; but your petitioners state that they are informed and believe that the lien of the mortgage last aforesaid is inferior to the lien of the aforesaid conveyance, executed July 1st, 1879, by said Champaign, Havana and Western Railway Company to Ford and Brock as trustees, and also inferior to the lien of the aforesaid conveyance, executed December 1st, 1880, by said Wabash, St. Louis and Pacific Railway Company to Henry F. Spaulding and John T. Terry, trustees, as aforesaid.

Your petitioners further state that they are informed and believe that of the aforesaid fifty thousand "general mortgage bonds"
429 only seventeen thousand thereof are issued, now outstanding, and secured by the "general mortgage" aforesaid.

Your petitioners further state that on the first day of June, 1884, both the said Wabash, St. Louis and Pacific Railway Company and your petitioners, as the receivers of all its property and income, failed and neglected to pay the semi-annual interest, amounting to $36,300.00, then due on the aforesaid one thousand two hundred and ten bonds so issued by said Wabash, St. Louis and Pacific Railway Company on the first day of December, 1880, and that said interest has not yet been paid; and, furthermore, that on the first day of July, 1884, the said Wabash, St. Louis and Pacific Railway Company, as well as your petitioners, as receivers of all its property and income, also failed and neglected to pay the semi-annual interest, amounting to $12,250.00, then due on the said $350,000.00 of the bonds of said Champaign, Havana and Western Railway Company issued on the first day of July, 1879, and that said interest has not yet been paid.

Your petitioners further state that they are informed and believe that said "Champaign, Havana and Western railway" is worth much more than the amount of the aforesaid mortgage debts of $350,000.00 and $1,210,000.00, and that under ordinary circumstances, with proper and skilful management, with average crops

and business upon and along the line thereof, said road would annually earn a sum sufficient to pay all its operating expenses, the cost of maintenance, the interest on the two series of mortgage bonds last aforesaid, and leave a considerable surplus to be applied to the payment of interest upon the "general mortgage bonds" of said company; and your petitioners further state that the revenue derived from business originating along the line of said "Champaign, Havana and Western railway" and brought by it to
430 the main line of said Wabash, St. Louis and Pacific railway and delivered to it for transportation will contribute largely to the income of said main line and to the raising of sufficient revenue for the payment of interest on said "general mortgage bonds" and other debts of said company.

Your petitioners further state that they are informed and believe that, owing to a partial failure of the crops for the past three years in the section of country through which said railway is constructed, the business and income of said railroad have been reduced far below what might, with reasonable certainty, be expected in all ordinary seasons.

Your petitioners further state that to put said road in good order and render it in all respects suitable and safe for the transaction of business the said Wabash, St. Louis and Pacific Railway Company did, after its acquisition thereof, expend large sums of money in permanently improving and bettering its condition; and your petitioners further state that they are informed and believe that the crops along the line of said railway for the present year, now fully matured, are such as to reasonably and fairly induce and warrant a belief that during the next twelve months the income from the business of said road will be increased nearly, if not quite, one hundred per cent. over what it has been during any of the three years last past.

Wherefore, considering the large sums of money heretofore spent by said Wabash, St. Louis and Pacific Railway Company in permanently improving the condition of said property; that manifestly there is soon to be a large increase in the business of said line, and that the earnings thereof will, in the immediate future, not
431 only be sufficient to pay the cost of maintaining and operating the same and interest on said first and second mortgage bonds, but that there will, as your petitioners believe, be a large surplus that can be applied from time to time to the payment of interest on said "general mortgage bonds" or to the payment of the other indebtedness of said company, all of which will render said line of great value to the said Wabash, St. Louis and Pacific Railway Company, as well as to all the creditors thereof, your petitioners therefore pray for the advice and directions of the court in the premises, and that your honors make such order concerning the payment of interest now due and to become due on the aforesaid "first" and "second" mortgage bonds as to your honors shall seem meet.

SOLON HUMPHREYS,
THOS. E. TUTT, *Receivers.*

432 On the 15th day of October, 1884, the matter of the payment of interest on the Havana Division bonds coming before the court, the following opinion was delivered, to wit:

Mr. SMITH: "I presented on yesterday the report of the master on the petition of the receivers for instruction as to the bonds of the Havana Division of the Wabash road, and your honor suggested that it should be brought up again this morning. I am ready to present it if your honor is ready to hear it.

(The petition was then read.)

The COURT: "I stated at an early day, and Judge Brewer has gone over that matter (and we are in accord with regard to it), that I am not going to take the money that belongs to the underlying mortgages to pay interest on non-earning branches. If they have got to fail they must fail. I will protect the underlying mortgages especially, and they haven't got enough here to do it.

Mr. SMITH: "Your honor remembers these are underlying mortgages on this line.

The COURT: "No, not if I understand the petition. They have chosen unwisely, it may be with the exception of a few, to take general mortgage bonds. There are a few underlying.

Mr. SMITH: "I will re-read that portion of the petition.

(Petition re-read.)

The COURT: "I understand all that. Now what? If the bondholders of the Havana Division are prior in right to the general mortgage and it is not earning enough, why should the other concerns have their money taken to pay a non-paying concern? That is the question that presses on the mind of the court.

* * * * * * *

Mr. SMITH: "Then I ask that the matter be re-referred to the master, and we will introduce testimony showing the actual earnings of the road in the past three months.

433 The COURT: "That is the important element. If this branch is earning enough to pay its own interest that is another inquiry; but certainly I am not going to sit here and order that the earnings that belong to other branches in this consolidated system shall be taken to pay concerns that do not earn running expenses. Let them collapse."

On the 2nd day of October, 1885, intervenor filed its answer to the various bills and cross-bills of the parties to said consolidated cause, being as follows, to wit:

Answer of St. Joseph & St. L. R. R. Co. to Various Bills and Cross-Bills.

"THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.*
} Consolidated Cause.

Now, this day, comes The St. Joseph and St. Louis Railroad Com-

pany, one of the defendants named in said cause, and for its answer to the allegations of the bills and cross-bills in said consolidated cause asks to refer to its amended intervening petition, filed herein, and adopts said amended intervening petition as its answer to the said bills and cross-bills and the allegations therein contained; and, further, said defendant says that under the terms of the lease in said amended intervening petition mentioned and set out it is entitled to receive as rental thirty per cent. of the gross earnings of its said road, and that it ought not, in equity and justice, to be charged for any of the expenses of operating either its own road or any part of the Wabash system, so called; and it says, further, that it ought not to be charged with any of the receivers' certificates issued or that may be issued under the orders of the court already made or that may be made in the future, and ought not, in justice and equity, to be charged with any part of said certificates, nor ought the
434 same or any part thereof to be or constitute a lien upon its road, or upon the earnings thereof, or upon its rental, or upon any property of the said company; and it hereby respectfully enters its protest against any order heretofore made or that hereafter may be made by the court which shall charge or attempt to charge defendant or its road or property or any part thereof with the payment of said receivers' certificates or any part thereof or which shall make or attempt to make said receivers' certificates or any part thereof a lien upon its said road or property.

ST. JOSEPH & ST. LOUIS RAILROAD COMPANY,
By PATTISON & CRANE, *Its Solicitors.*"

On the 2nd day of November, 1885, the said court made the following order in said cause, to wit:

435 In the Circuit Court of the United States for the Eastern District of Missouri.

THE CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants, *vs.* THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY *et al.*, Defendants.	In Chancery. Nos. 2357 and 2464, Consolidated.

Order Concerning Answers Filed Herein.

NOVEMBER 2D, 1885.

It appearing that certain defendants in this consolidated cause have filed answers to the original bill of the Wabash, St. Louis and Pacific Railway Company in cause No. 2357, consolidated herein with cause No. 2464, or to said original bill as amended, and that certain defendants have also filed answers to the original cross-bill of the Central Trust Company *et al.*, filed in said cause No. 2357, also consolidated herein with said cause No. 2464, or to said original

cross-bill as amended, and that some of said defendants have
436 not filed answers to the original bill of the Central Trust Company of New York *et al.*, removed to this court from the circuit court of the city of St. Louis, Missouri, and numbered in this court as cause No. 2464, and consolidated herein with said cause No. 2357, and that some of the defendants have filed answers to said original bill of the Central Trust Company of New York *et al.*, so removed from the State court to this court, without answering either the said original or amended bills of the said Wabash Company or the said original cross-bill or amended cross-bill of the said Central Trust Company *et al.*, to prevent confusion in the pleadings herein and to protect the rights of all such defendants it is ordered that all answers filed herein to the original or amended bills of the Wabash Company and the original or amended cross-bills of the Central Trust Company *et al.* shall be taken to be and considered as answers to said original removed bill of the Central Trust Company *et al.*, and that all answers filed herein to said last-mentioned bill shall be taken to be and considered as answers to said former bills and cross-bills.

On the 6th day of January, 1886, said consolidated cause came on for final hearing before said court, and the following decree of foreclosure and sale was entered, to wit:

437 In the Circuit Court of the United States for the Eastern District of Missouri. September Term, A. D. 1885. In Equity.

THE CENTRAL TRUST COMPANY OF NEW YORK and Others
against
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY and Others.
} Nos. 2357 and 2464. Consolidated Cause.

Decree of Foreclosure and Sale, January 6th, 1886.

Now, on this day, came the following parties, by their solicitors, namely:

The Central Trust Company of New York, James Cheney; The Wabash, St. Louis & Pacific Railway Company, The Mercantile Trust Company of New York, The St. Louis, Iron Mountain
438 & Southern Railway Company, Solon Humphreys, John T. Terry, and all the other defendants who have answered the bill of the Central Trust Company of New York and James Cheney, or the bill filed by the said complainants in the State court and removed to this court, or the cross-bill filed by the Mercantile Trust Company of New York, viz:

1. Anthony J. Thomas,
2. Charles Edward Tracy,
} As trustees of the Cairo Division.
3. United States Trust Company of New York.
4. Quincy, Missouri & Pacific Railroad Co.

5. Charles H. Bull.
6. Amos Green.
7. Henry F. Spaulding.
8. St. Joseph & St. Louis Railroad Co.
9. St. Louis Bridge Co.
10. The Tunnel railroad of St. Louis.
11. St. Louis, Council Bluffs & Omaha Railroad Co.
12. James B. Eads.
13. Joseph A. Jamison.
14. Charles Parsons.
15. Isaac H. Knox.
16. Geo. E. Leighton.
17. Louis H. Meyer.
18. Michigan City & Indianapolis Railroad Co.
19. William Nichols.
20. Geo. S. Coe.
21. Indianapolis, Peru & Chicago Railway Co.
22. German Savings Institution.
23. Boone County and Boonville Railway Co.
24. Brunswick & Chillicothe Railway Co.

439 25. Geo. M. Rice.
26. Edward P. Burnham.
27. John Kimball.
28. Chicago, Cincinnati & Louisville Railroad Co.
29. Clarinda & St. Louis Railroad Co.
30. Geo. I. Seney.
31. Geo. T. M. Davis.
32. Des Moines Northwestern Railway Co.
33. Farmers' Loan and Trust Co.
34. Henry W. Ford.
35. Richard S. Brock.
36. J. P. Giraud Foster.
37. Edward K. Goodnow.
38. John M. Woodson.
39. Robert A. Betts.
40. Alexander M. White.
41. Henry H. Worden.
42. James R. Jesup.
43. John N. A. Griswold.

And it appearing to the court that all the defendants to the bills of complaint aforesaid have entered their appearance herein or have been duly served with process herein or have been notified of the pendency of this cause by personal service or by publication as heretofore ordered by the court, such service of process or notice being given and such publication having been made more than twenty days before the first Monday of October, A. D. 1885.

It also appearing to the court that the following trustees have either resigned their trusts or departed this life, namely:

1. Edwin D. Morgan.
2. H. F. Vail.

440 3. O. H. Browning.
4. Abram W. Hendricks.
5. Lucien Tilton.

The court finds that the trusts represented by the parties above named as having resigned their trusts or departed this life are fully represented in this cause, or that such trusts will not be affected by this decree.

The court also finds that of the parties defendant served with process or notified as aforesaid a large number have been defaulted more than a month before the rendition of this decree, and the original and removed bills of the Central Trust Company and James Cheney taken for confessed against them and each of them, viz:

1. John R. Lionberger.
2. Attica, Covington and Southern R. R. Co.
3. Champaign and Southeastern R'y Co.
4. Havana, Rantoul and Eastern R. R. Co.
5. Des Moines and St. Louis R. R. Co.
6. Council Bluffs and St. Louis R'y Co.
7. Humeston and Shenandoah R. R. Co.
8. St. Louis, Ottumwa and Cedar Rapids R. R. Co.
9. Alfred T. White.
10. Daniel A. Lindley.
11. Wager Swayne.
12. Clifford A. Hand.
13. Robert C. Martin.
14. George J. Gould.
15. John Paton.
16. David J. Tyson.
17. Charles E. Whitehead.
18. William Hill.

441 19. Theodore Gilman.
20. Edward De Rose.

21. Henry A. Mott.
22. Charles Jackson.
23. G. M. Whittemore.
24. James H. Britton.
25. Townsend Underhill.
26. William H. Ladd.
27. J. C. Rogers.
28. Benjamin Ham.
29. Archibald Hopkins.
30. James Compton.
31. Abram W. Hendricks.
32. Thomas B. Coulter.
33. Thomas Mayo.
34. Philip Henry Brown.
35. Metropolitan National Bank.
36. Eel River R. R. Co.
37. Toledo, Peoria & Western R. R. Co.

38. St. Louis, Jerseyville & Springfield R. R. Co.
39. Peoria & Pekin Union R. R. Co.
40. Chicago & Western Indiana R. R. Co.
41. Chicago, St. Louis & Pittsburgh R. R. Co.
42. Hannibal Bridge Co.
43. Missouri, Iowa & Nebraska R. R. Co.

The court finds and adjudges that because the bills so filed by the Central Trust Company and James Cheney and the cross-bill filed by the Mercantile Trust Company of New York cover and embrace all the rights and equities upon which the property hereinafter described can or ought to be sold by decree or decrees of
442 this court in this cause it will not be necessary to found this decree on the original or amended bills of the Wabash, St. Louis & Pacific Railway Company or the prayers thereof; but said last-named bills will be retained by the court for the purpose of adjusting all such rights as have arisen under the same, but not for the purpose of foreclosing under the prayers thereof any of the instruments hereinafter described.

And now, this cause coming on for final hearing on the original removed bill and cross-bills of the Central Trust Company of New York (to be called hereafter the Central Trust Company for the sake of brevity) and James Cheney; the cross-bill of the Mercantile Trust Company; the answer of the Wabash, St. Louis & Pacific Railway Company (to be called hereinafter The Wabash Company for the sake of brevity), and all other answers to the above bills of parties appearing of record, with all replications, exhibits, reports of masters or commissioners to whom any of the questions or issues herein presented were referred, and also all evidence taken in said cause relating to said questions and issues, and all replications of the parties or any of them, and also upon the default of all parties who have suffered default as aforesaid;

And the court, having heard the arguments of counsel and being fully advised in the premises, finds and adjudges:

On the first day of June, A. D. 1880, the Wabash Company was a body corporate formed by the consolidation of certain other corporations organized under the laws of the States of Ohio, Indiana, Illinois, and Missouri, and that said company then owned cer-
443 tain lines of railroad formerly owned by other bodies or parties, with all the property, real and personal, and all the franchises thereof; that said Wabash Company was then acquiring or in contemplation of acquiring still other lines of railroad, with the property and franchises thereof, by lease, consolidation, or otherwise; all of which lines so owned or held or so about to be acquired will be more fully described hereinafter.

On the first day of June, A. D. 1880, the said Wabash Company, for the purpose of securing an intended issue of its mortgage bonds to the amount of fifty millions of dollars (to be known as "general mortgage bonds") and the payment of the principal and interest thereof, duly executed and delivered to the Central Trust Company of New York and James Cheney, of Indiana, as trustees, its mortgage

or deed of trust (known as "the general mortgage"), and thereby conveyed to said trustees for the purposes in said general mortgage fully set forth certain lines of railroad and certain interests as the same then existed or might thereafter exist in and to certain other lines of railroad, with all the property and franchises, rights, income, and choses in action pertaining thereto. The lines of railroad and property and interests specifically described and defined in said mortgage (such description being hereby adopted) and the extent of the lien thereby created as against certain other liens are set forth in said mortgage as follows, such enumeration, however, not embracing other lines of railroad afterwards acquired by the Wabash Company and to which the lien of said general mortgage afterwards attached:

444 "All of the right of way and railroad of the said first party extending from the city of Toledo, in the State of Ohio, through the State of Indiana, and thence into the State of Illinois to Meredosia, with branch of said road to Naples and East Hannibal, and from Meredosia to Camp Point, in the State of Illinois, and with branch of said road from Clayton to the east bank of the Mississippi river at Hamilton, in said State, and with branch of said road leading from Decatur, in said State, to East St. Louis, in the same State; and also the railway of the party of the first part extending from St. Louis, in the State of Missouri, in a northwesterly direction, to Kansas City, Missouri, with a lateral extension from Moberly, in the county of Randolph, to Ottumwa, in the State of Iowa, and a branch from Salisbury, in the county of Chariton, State of Missouri, to Glasgow, in the county of Howard, in said State; and also an extension from Brunswick, in said county of Chariton, in a northwesterly direction, to the city of Council Bluffs, in the State of Iowa, which lines of railroad will, when united, form one continuous line of railway in the same general direction from the waters of Lake Erie at Toledo, Ohio, to the cities of Council Bluffs and Kansas City, on the Missouri river as aforesaid, together with all the embankments, bridges, turnouts, side tracks, buildings and structures, water tanks and fixtures, shops, engine and other houses, depots, turn-tables, engines, cars, machinery, tools, ferry and other boats, and every other thing appurtenant to said railroad or used in connection

445 therewith, belonging to the said first party, together with all rents, issues and profits, credits, and choses in action accruing to said first party from said railroad and appurtenances, as owner and holder thereof.

"And the said Wabash, St. Louis and Pacific Railway Company, in consideration of the premises above recited and for the further security of the bonds above described, does hereby grant, bargain, sell, assign, transfer, and convey unto the Central Trust Company of New York and James Cheney, trustees, their heirs and successors in said trust, all the right, title, and interest of said first party, as the same now exists or may hereafter exist, by virtue of any contract, lease, purchase, or consolidation in and to the following-described railroads now in process of amalgamation with the railroad of the said first party, including with said railroads every appur-

tenance thereto or thing used in connection therewith, and all rents, issues, and profits arising therefrom, to the said first party; all the above as fully as above described, with reference to the railroad now owned and held by said first party and as fully as it is or may be possible for said first party to convey the same:

"The Boone County and Booneville railway, extending from Centralia to Columbia, in the State of Missouri.

"The St. Louis, Ottumwa and Cedar Rapids railway, extending from Moberly, in the State of Missouri, to Ottumwa, in the State of Iowa.

446 "The St. Joseph and St. Louis railway, extending from New Lexington and Richmond and Lexington Junction to St. Joseph, in the State of Missouri.

"The Brunswick and Chillicothe railway, extending from Brunswick to Chillicothe, in the State of Missouri.

"The St. Louis, Council Bluffs and Omaha railway, extending from Chillicothe to Elm Flats, in the State of Missouri.

"The Chicago and Paducah railway, extending from Effingham and Altamont to Streator, in the State of Illinois.

"The Chicago and Strawn railway, extending from Strawn to Chicago, in the State of Illinois.

"The Eel River railway, extending from Logansport to Butler, in the State of Indiana.

"The Quincy, Missouri and Pacific railway, extending from West Quincy, in the State of Missouri, to the Missouri river opposite Brownsville, Nebraska.

"The Missouri, Iowa and Nebraska railway, extending from Keokuk, Iowa, to a junction with the Omaha Division of the Wabash, St. Louis and Pacific railway near the line between the State of Iowa and the State of Missouri.

"The Champaign, Havana and Western railway, extending from Champaign to Havana, in the State of Illinois, and from White Heath to Decatur, in the State of Illinois.

"The Toledo, Peoria and Western railway, extending from Warsaw, in the State of Illinois, to the State line of Indiana, and
447 from La Harpe, in the State of Illinois, to Burlington, in the State of Iowa.

"The Detroit, Butler and St. Louis railway, from Butler, in the State of Indiana, to Detroit, in the State of Michigan; to have and to hold the said property, real and personal, including the said railroads, appurtenances, equipment, franchises, rights, credits and choses in action, and every interest herein granted, *that* the said trustees, as joint tenants and not as tenants in common, and the survivor of them, his heirs and successors, but in trust, nevertheless, for the use and purposes herein declared and for the purpose of protecting and securing the holders of said fifty thousand bonds and each and every of them, and upon the conditions following—that is to say:

"The estate hereby conveyed and the lien of the trust hereby created shall be expressly subject and inferior to all such prior liens above referred to as are charged upon the several portions of the

railroad and equipment of the railroad now of said first party and to the estate and lien of such specific trusts and mortgages or other obligations as may be hereafter made and charged by the said first party upon specific property which said first party hereafter may acquire and shall form part of the purchase-money or condition of the acquisition of the property so charged by said first party."

The court further finds and adjudges that, in addition to the lines of railroad specifically described in said general mortgage,
448 the lien thereof also attached to all the right and title of the Wabash Company in and to all the following railroads, property, franchises, rights, and interests, whether acquired before or after the execution of the said general mortgage and whether acquired by purchase, lease or consolidation, or contract, viz:

The Clarinda and St. Louis railway, being 10.1 miles long in the State of Missouri and 11.7 miles in the State of Iowa, making a railroad 21½ miles in length, extending from Clarinda, Iowa, to Roseberry, Missouri. Said Wabash Company acquired title in fee to the Missouri portion of said railroad and a leasehold title to the remainder.

The Peoria, Pekin and Jacksonville railroad, extending from Pekin, Illinois, to Jacksonville, Illinois, a distance of 72.2 miles, said railroad having been acquired by purchase July 25, 1881.

The Springfield and Northwestern railroad, extending from Springfield, Illinois, to Havana, Illinois, a distance of 44.1 miles, said railroad being acquired by purchase July 30, 1881.

The Centreville, Moravia and Albia railroad, extending from Centreville, Iowa, to Albia, Iowa, a distance of about 25 miles. Said railroad was leased to the Missouri, Iowa and Nebraska Railroad Company and came to the Wabash Company with the property of said last-named company.

The Des Moines and St. Louis railroad, extending from Des Moines, in the State of Iowa, to Albia, in said State, through the counties of Polk, Marion, and Monroe, in said State, a dis-
449 tance of 67.3 miles, leased to the Wabash Company on the first day of March, 1882.

The St. Louis, Jerseyville and Springfield railroad, extending from Grafton, Illinois, to a point near Bates, Illinois, a distance of 71.4 miles. Said railroad was acquired by lease August 6, 1881.

The Attica, Covington and Southern railroad extending from Attica, Indiana, to Covington, Indiana, a distance of 14½ miles, leased to said Wabash Company July 18, 1881.

The Michigan City and Indianapolis railroad, extending from Michigan City to La Porte, Indiana, a distance of 12.75 miles, leased to the Wabash Company June 1st, 1881.

The Indianapolis, Peru and Chicago railroad, extending from Indianapolis, Indiana, to Peru, Indiana, a distance of 75 miles, leased to said Wabash Company June 1st, 1881.

The Braidwood Branch, being a line ten and nine-tenths miles long, extending from near Braidwood, Illinois, to the Chicago Branch of the Wabash railroad. Said branch is partially con-

structed, and was built by moneys arising from the sale of general mortgage bonds aforesaid.

The Champaign and Southeastern railroad, extending from Champaign, Illinois, to Sidney, Illinois, a distance of 11.6 miles, which was leased by the Wabash Company March 1st, 1882.

The Madison County railroad, extending from Edwardsville, Illinois, to its junction with the Chicago and Alton railroad, a distance of 8.5 miles, acquired by the Wabash Company by purchase.

450 The Humeston and Shenandoah railroad, extending from Humeston to Shenandoah, Iowa, a distance of 113 miles, in which the Wabash Company owns a one half interest.

Certain real estate and terminal privileges in Burlington, Iowa, more particularly described in mortgage hereinafter referred to.

The bridge over the Mississippi river at St. Louis, with the tunnel and terminal rights in said city, leased by said Wabash Company and the Missouri Pacific Railway Company, as set forth in a certain lease hereinafter referred to.

The bridge over the Mississippi river at Hannibal, Missouri, leased by the two last-named companies, as set forth in a lease hereinafter referred to.

Certain right of use of the bridge over the Missouri river at Kansas City, Missouri, held under a lease or contract with Hannibal and St. Joseph Railroad Company, hereinafter referred to.

The right to use certain tracks and terminal facilities in Cook county, Illinois, and in Chicago, Illinois, under lease or contract with the Chicago and Western Indiana Railroad Company, hereinafter referred to.

The right to use certain tracks and terminal facilities owned by the Peoria and Pekin Union Railway Company in Illinois under contract with said last-named company, dated February 1st, 1881, hereafter referred to.

451 The right to use certain tracks and depot facilities in the Union depot in Kansas City, Missouri, under contract with the Kansas City Depot Company, dated June 1st, 1876, hereinafter referred to.

The right to use certain tracks and depot facilities in the Union depot in Hannibal, Missouri, under contract with Hannibal Depot Company, dated June 30, 1881, hereinafter referred to.

The right to use certain tracks and depot facilities in the Union depot in St. Joseph, Missouri, under contract with St. Joseph Union Depot Company, dated September 2, 1880.

The right to use certain tracks and depot facilities in the Union depot at Detroit, Michigan, under contract October 20, 1881, hereinafter referred to.

The right to use certain tracks extending from Clayton, Illinois, to Quincy, Illinois, and certain depot and station facilities in said last-named city, said right arising under a contract or lease, dated January 1st, 1878, between the Chicago, Burlington and Quincy Railway Company and said Wabash Company.

An interest in the Elevator Company at Council Bluffs, Iowa, upon which a payment to the amount of $41,666.66 has been made

by the Wabash Railway Company, for which no certificate has been issued.

Three hundred coal cars acquired from the National Rolling Stock Company, November 23d, 1883, under an agreement to pay mileage on the same, with privilege of purchase at end of any one year, etc.

The following tracts or parcels of land, the title to which
452 was taken in the name of James F. How, as trustee, before the appointment of receivers in this cause:

Marion county, Iowa:

Lot 6, subdiv. of S. 7, T. 77, R. 21.

In the city of Chicago, State of Illinois:

In the assessor's div. of N. W. $\frac{1}{4}$ of W. $\frac{1}{2}$ N. E. $\frac{1}{4}$ sec. 32, T. 39 N., R. 14 east, block 13.

In Brown's Addition in the N. E. $\frac{1}{4}$ sec. 32, T. 39 N., R. 14 E.; lot 8, in block 3; lots 8, 9, 43, 44, in block 4.

Gallaher's subdiv. of the S. $\frac{1}{2}$ of block 9, in canal trustees' subdiv. of sec. 33, T. 39 N., R. 14 east.

Lots 19, 20, and 28, in block 2; lots 24, 34, 31, and 32, in block 1.

T. J. Foster's subdiv. of the part of block 10, canal trustees' subdiv. sec. 33, T. 39 N., R. 14 east.

Lots 1 and 37, in bl'k 1, and lots 1 and 37, in bl'k 2.

Guno's subdiv. of part block 10, canal trustees' subdiv. sec. 33, T. 39 N., R. 14 east; lot 47.

Canal trustees' subdiv. of sec. 33, T. 39 N., R. 14 E.; S. W. part 364.6 and 480 ft. of block 12.

Sutton's subdiv. of bl'k 28 of canal trustees' subdiv. S. 33, T. 39 N., R. 14 E.

Lots 5, 44, and 45, in block 2.

In assessors' div. of bl'k 11 of canal trustees' subdiv. sec. 33, T. 39 N., R. 14 E.

Lots 61 and 62, in block 11.

In the city of St. Joseph, State of Missouri:

In South St. Joseph Addition to said city.

Lots 1, 2, 3, 4, 5, 6, and 7, in block 56; lots 1, 2, 3, 4, 5, 6, and 7, in block 57; lots 5, 6, and 7, in block 58; lots 12, 13, and 14, in block 55.

453 In the city of St. Louis, State of Missouri:

In Scott's Addition to said city.

Lots 25, 26, 1, 2, 36, 33, and four feet and eight inches of lot 32, of block 6.

The court also finds and adjudges that the Wabash Company acquired title to the following lines of railroad, with all the franchises and property, real and personal, and all choses in action, rights, incomes, revenues, and credits pertaining thereto or used in connection therewith, by the use of the general mortgage bonds aforesaid, and that said lines, rights, property, and interests were purchased by said company with said general mortgage bonds, viz:

The Peoria, Pekin and Jacksonville railroad, hereinbefore described.

The Springfield and Northwestern railroad, hereinbefore described.

The Braidwood Branch, hereinbefore described.

It is adjudged that as to all property, rights, interest, and choses in action acquired by the Wabash Company after the execution of said general mortgage, whether described in the same or not (except such as are herein otherwise adjudged and such as pertain to railroads not herein declared to be subject to the general mortgage), the lien of said mortgage attached and is now in force.

It is, however, adjudged that the said general mortgage on the property of the Wabash Company did not attach to or be-
454 come a lien on the railroad or property of the Havana, Rantoul and Eastern Railroad Company.

The court finds that said mortgage was duly recorded, as required by law, and for all the contents and provisions thereof and for the terms and provisions of the bonds secured thereby and the coupons attached thereto reference is hereby made to a true copy of said mortgage filed by said Wabash Company, with its original and amended bills, in this cause, marked Exhibit "B," and commencing on page 1 of volume 1 of the printed volume of exhibits.

The court further finds and adjudges that afterwards, on the first day of May, A. D. 1883, for the purpose of securing an intended issue of its bonds (called collateral trust bonds), amounting to ten millions of dollars, said Wabash Company executed and delivered to the Mercantile Trust Company of New York, as trustee, a certain other indenture called and known as "the collateral trust," and thereby assigned and transferred to said last-named company for the purposes of said trust all the bonds, stocks, cars, steamboats, rolling stock, and interest in real estate specified in said instrument, and then and there delivered all said bonds, stocks, and evidences of title to said trustee.

And for the terms and conditions of said collateral trust and of the bonds and coupons intended to be secured thereby reference is hereby made to a true copy thereof filed by said Wabash Company with its original and amended bills herein, marked Exhibit "D," appearing in said printed volume 1 of exhibits, beginning on page 33.

455 The court finds and adjudges that at the time of the execution of the collateral trust the said Wabash Company transferred and delivered to the Mercantile Trust Company, trustee under said instrument, certain stocks, bonds, assignments, bills of sale, and other evidences of title to property, real and personal, pledged in and by said collateral trust, and that said stocks, bonds, assignments, bills of sale, and other evidences of title were as follows, this decree adopting the description given in said instrument and the preamble by which said description is introduced therein:

"Whereas the Wabash, St. Louis and Pacific Railway Company has deposited with the Mercantile Trust Company of New York assignments, bills of sale, or other evidences of title to the following-described bonds, shares, real estate, and other property, viz:

"$46,000 Union Bridge Company bonds.

"$1,342,000 Humeston and Shenandoah Railroad Company first-mortgage 7 per cent. bonds.

"$1,000,000 Wabash, St. Louis and Pacific Railway Company general mortgage six per cent. bonds.

"$400,000 Wabash Railway Company mortgage seven per cent. bonds of 1879.

"$199,000 Wabash, St. Louis and Pacific Railway Company, Detroit Division, six per cent. bonds.

"248,000 Quincy, Missouri and Pacific Railroad Company income bonds.

"$1,711,000 Toledo, Peoria and Western Railroad Company first preferred income bonds.

"$728,000 Toledo, Peoria and Western Railroad Company second preferred income bonds.

456 "13,404 shares Toledo, Peoria and Western Railroad Company.

"10 shares St. Joseph Union Depot.

"210 shares Union Depot Company of Kansas City, Missouri.

"10 shares Hannibal Union Depot Company.

"5,187 shares Des Moines Northwestern Railway Company.

"2,214 shares Havana, Rantoul and Eastern Railroad Company.

"9,996 shares Des Moines and St. Louis Railroad Company.

"20,127 shares Humeston and Shenandoah Railroad Company.

"21,534.96 shares Missouri, Iowa and Nebraska Railway Company.

"9,000 shares St. Louis, Jerseyville and Springfield Railroad Company.

"2,030 shares Clarinda and St. Louis Railroad Company.

"14,246 shares Quincy, Missouri and Pacific Railroad Company.

"5,380 shares St. Louis, Ottumwa and Cedar Rapids Railway Company.

"11,089 shares Council Bluffs and St. Louis Railway Company.

"7,281 shares St. Louis, Council Bluffs and Omaha Railroad Company.

"4,332 shares Brunswick and Chillicothe Railroad Company.

"2,687 shares Centreville, Moravia and Albia Railroad Company.

457 "750 shares Attica, Covington and Southern Railway Company.

"1,665 shares American Refrigerator Transit Company of Illinois.

"60 shares Union Bridge Company of Toledo, Ohio.

"17 shares St. Louis County Railroad Company.

"4,994 shares Peoria and Pekin Union Railway Company.

"9,999 shares Chicago and Western Indiana Railroad Company.

"12,590 shares St. Louis Bridge Company common stock.

"1,160 shares St. Louis and Mississippi Valley Transportation Company.

"Steamers now on Lake Erie, known as the 'Russell Sage,' 'John C. Gault,' 'A. L. Hopkins,' and 'Morley.'

"15 locomotives manufactured by the Rhode Island Locomotive Works.

"13 passenger cars manufactured by Barney, Smith & Co.
"5 baggage cars manufactured by Barney, Smith & Co.
"1,210 freight cars manufactured by Barney, Smith & Co.
"All the right, title, and interest of said party of the first part in and to certain rolling stock, being all the rolling stock mentioned and described in certain agreements between the party of the first part and the New York and Pacific Car Trust Association."

458 But the court finds that of the stock of the Des Moines Northwestern Railway Company the said Mercantile Trust Company now holds only 5,037 shares subject to said mortgage.

The said collateral trust also embraced and attached to certain real estate therein referred to, situate in the county of Cook and State of Illinois, held in trust for said Wabash Company by Solon Humphreys, and which the court finds was conveyed to said Solon Humphreys alone, in trust for said Wabash Company. Said real estate is more particularly described as follows:

The whole of lots 1 and 2, in block 9.
The whole of lots 3 and 4, in block 9.
The whole of lots 5 and 6, in block 9.

All in Springer and Fox Addition to the city of Chicago, in Cook county, State of Illinois.

Also assessors' division of the N. W. ¼ and W. ½ N. E. ¼ section 32, town 39 N., range 14 east, all lying east of the south branch of the Chicago river of latitude 32, and all being in the county of Cook aforesaid.

It is further found and adjudged by the court that of the general mortgage bonds intended to be issued as aforesaid there were in fact issued and are now outstanding and unpaid a number thereof, the principal of which amounts to seventeen million dollars, and that there is due for interest thereon and upon coupons attached thereto since the latter matured the further sum of two millions one hundred and thirty-two thousand seven hundred and fifty-three dollars and forty cents, up to December 1, 1885, of which number

459 sixteen millions of dollars were sold for value, and the remaining one million were hypothecated to the Mercantile Trust Company of New York, as trustee in the collateral trust mortgage, and now held subject to said trust; and reference is hereby made to the report of the special master to whom was referred the matter of taking proof as to the number and amount of said bonds now outstanding, the amount of principal and interest due thereon, and the names of the parties owning and holding the same as far as now known.

The court further finds that the Wabash Company, on the first day of June, A. D. 1884, made default in the payment of all the interest which became due on said bonds on said day, and that such default has continued ever since that time; that said company also made default in the payment of all installments of interest maturing on said bonds since said first day of June, A. D. 1884, and that all such defaults have continued ever since.

The court finds further that demand was duly made by the holders of a large number of said bonds and coupons at the office of said

Wabash Company, in the city of New York, for the payment of the interest maturing thereon on the first day of June, A. D. 1884, such demand being made on or after said day, and payment was then and there refused.

That in the month of December, 1885, after the said default had continued for more than six months after the maturity of said coupons on the first day of June, 1884, and the demand made for the payment thereof as aforesaid, the holders of more than a
460 majority in value of all the general mortgage bonds then outstanding and secured by said general mortgage determined that they required the principal of all said bonds then outstanding to become at once due and payable, and so notified the trustees named in said mortgage, and also gave notice in writing to said trustees of their having so determined, and thereby required said trustees to exercise the powers conferred on them by said mortgage to enforce the payment of the indebtedness and to proceed to foreclose the said mortgage by judicial decree.

It is therefore adjudged and decreed by the court that the principal sums specified in the general mortgage bonds aforesaid, as well as the interest thereon, have now become due and payable according to the terms and conditions of said instrument.

The court, being fully advised, also finds and adjudges that of the collateral trust bonds aforesaid there were issued and either sold for value or so pledged as to entitle the parties holding the same to the proceeds thereof and the security created therefor as aforesaid the whole amount of ten million of dollars of principal; that there is due thereon to Dec. 1, 1885, the additional sum of $1,109,268.80 as interest on said bonds and on coupons attached thereto since the maturing of such coupons.

That the Wabash Company made default in the payment of interest maturing on said collateral trust bonds on the first day of May, A. D. 1884, and on each installment of interest maturing since that time; that demand was duly made for the payment of
461 interest maturing as aforesaid on the first day of May, A. D. 1884, at the office of the Wabash Company, in the city of New York, by the holders of a large number of said bonds and coupons, such demand being made on and after said first day of May, 1884; that after said default had been so made and after the demand aforesaid the holders of more than twenty-five per cent. of all said collateral bonds then outstanding, in writing, requested the Mercantile Trust Company aforesaid to proceed under the power contained in said indenture to sell all or a sufficient amount of the securities in said collateral trust mentioned to produce a sum sufficient to pay all the principal and interest of said entire issue of said bonds; that due notice of such request and of the purpose of said trustee to comply therewith was given to the Wabash Railway Company more than sixty days before said Mercantile Trust Company filed its cross-bill herein; but that, all said property embraced in said collateral trust being under the control of this court, said trustee did not exercise its power of sale, but filed its cross-bill for the foreclosure of said instrument as a mortgage. The court, therefore, adjudges

and decrees that the holders of said collateral trust bonds are now entitled to have the property embraced in said collateral trust sold and the proceeds applied to the payment of both the principal and interest of said bonds.

And for the number of said collateral trust bonds now outstanding and the names of the persons owning or holding the same reference is hereby made to the report of the master to whom said matter was referred by order of court.

462 The court further adjudges that upon the execution and recording of the general mortgage aforesaid the same became and was and still is a lien on the lines of railroad, franchises, interests, and property described in said mortgage as having been conveyed to said trustees at the time of the execution thereof, and that the said mortgage also became a lien on all the right, title, and interest of the Wabash Company in and to all such other lines of railroad, with all their property, rights, and franchises, as are described in said mortgage as being then in course of amalgamation with the property of said Wabash Company. The said last-mentioned lien attached to each of said lines of railroad, with the franchises and property thereof, to the extent of the interest and title of the Wabash Company therein, whether acquired at the time of the execution of the said mortgage or after that time.

The court also adjudges, as aforesaid, that the Wabash Company, before or after the execution of said general mortgage, by lease, consolidation, purchase, or contract, acquired title to or interests in certain other lines of railroad, franchises, or property not specifically described in said general mortgage, but hereinbefore referred to; that the lien of said general mortgage under the terms and provisions thereof attached to all of said railroads, franchises, property, rights, choses in action, and interests to the extent of the title and interest of the Wabash Company therein; but the court adjudges that the lien so created on any line of railroad, franchises, interests, or property acquired by the Wabash Company after the execution of said general mortgage was and is subject to any lien prior

463 or subsequent thereto created to secure the purchase-money of said railroad, franchise, property, or interest or to secure the performance of any condition on which said Wabash Company acquired the same.

It is further adjudged that at the time of the execution of said collateral trust and the delivery of the stocks, bonds, assignments, bills of sale, and other evidence of title to the property embraced therein by the Wabash Company to the Mercantile Trust Company, as trustee, said instrument became a lien on all the right, title, and interest of said Wabash Company in and to all the property, rights, and interests embraced in said collateral trust in favor of all owners and holders of said bonds, and that said lien is still in force.

It is further ordered and adjudged that this decree or any sale made thereunder shall not in any way prejudice or affect the rights of parties to or persons interested in certain mortgages, deeds of trust, leases, and contracts hereinafter set forth, but all the rights of such persons and parties are hereby reserved to them. The deeds of

trust, mortgages, leases, and contracts in regard to which such reservation is made are as follows:

A mortgage or deed of trust to secure the principal and interest of bonds amounting to $900,000, with interest thereon at the rate of 7 per cent. per annum, executed by the Toledo and Illinois Railroad Company to the Farmers' Loan and Trust Company, as trustee. Said mortgage became a lien on that portion of said railroad extending from Toledo, Ohio, to the Indiana State line, a distance of 75.5 miles. The said interest was paid up to August 1st, 1884,
464 except that represented by certain coupons funded under an agreement made in 1877.

A mortgage, dated August 1st, 1853, executed by the Lake Erie, Wabash and St. Louis Railroad Company to the Farmers' Loan and Trust Company, as trustee, to secure bonds amounting to $2,500,000, with interest at the rate of 7 per cent. per annum. Said mortgage became a lien on that portion of the railroad of the Wabash, St. Louis and Pacific Railway Company extending from the western boundary of the State of Ohio at the western terminus of the Toledo and Illinois railroad to the eastern boundary of Illinois, a distance of 166.1 miles.

A deed of trust, dated October 15, 1858, executed by the Toledo and Wabash Railroad Company to Edwin D. Morgan, as trustee, to secure bonds amounting to $1,000,000, with interest thereon at the rate of 7 per cent. per annum. Said deed of trust became a lien on that portion of said railroad extending from Toledo, Ohio, to the eastern boundary of the State of Indiana, all lying within the State of Ohio.

A deed a trust, dated October 15, 1858, executed by the Wabash and Western Railway Company to Edwin D. Morgan, as trustee, to secure the payment of bonds amounting to $1,500,000, with interest thereon at 7 per cent. per annum. Said deed of trust became a lien on all the said line of railroad in the State of Indiana, ex-
465 tending from the west line of the State of Ohio to the east line of the State of Illinois, a distance of 166.1 miles.

A deed of trust, dated May 25, A. D. 1863, executed by the Great Western Railroad Company of 1859 to George Griswold, Alexander M. White, and Henry Worden, as trustees, to secure bonds amounting to $2,496,000, with interest thereon at the rate of 7 per cent. per annum; that said mortgage became a lien on all said lines of railroad extending from Meredosia and Naples, in the State of Illinois, to the eastern boundary of Illinois, being 180.7 miles in length.

A deed of trust, dated May 11, A. D. 1865, executed by the Great Western Railway Company of 1859 to Solon Humphreys and James R. Jessup to secure bonds amounting to $2,500,000, with interest thereon at the rate of seven per cent. per annum; which said deed of trust became a lien on all that portion of railroad last above described.

A deed of trust, dated March 1st, 1862, executed by the Illinois and Southern Iowa Railroad Company to John N. A. Griswold, James R. Jessup, and Lucien Tilton, as trustees, which became a lien on all that portion of the railroad aforesaid extending from Car-

thage, Illinois, to Clayton, Illinois, a distance of 29.1 miles, said mortgage being executed to secure bonds amounting to $300,000,
466 with interest at six per cent. per annum, said interest being paid up to August 1st, 1884, except coupons funded as aforesaid.

A deed of trust, dated May 29, 1865, executed by the Quincy and Toledo Railroad Company to John T. Terry, as trustee, to secure the payment of bonds amounting to $500,000, with interest at seven per cent. per annum, which deed became a lien on all that portion of railroad extending from the west bank of the Illinois river opposite Meredosia to Camp Point and Clayton, in the State of Illinois, a distance of 33.6 miles.

A deed of trust, dated the 1st day of February, A. D. 1867, executed by the Toledo, Wabash and Western Railway Company to Isaac H. Knox and James R. Jessup, as trustees, to secure an intended issue of bonds amounting to $15,000,000, with interest at seven per cent. per annum thereon; that of the bonds so intended to be secured by said trust deed only $2,610,000 are now outstanding.

Said deed of trust became a lien on all said railroad extending from Toledo, Ohio, to Meredosia and Naples, Illinois, and from Meredosia to Camp Point, Illinois, and also from Clayton, Illinois, to the east bank of the Mississippi river at Hamilton, Illinois; also on all property afterwards acquired by said Toledo, Wabash and Western Railway Company which might be used in connection with said railroad, and all property that said company might acquire in the city of Quincy, Illinois, and also all interests
467 of said company for traffic purposes with the Chicago, Burlington and Quincy Railroad Company.

A deed of trust, dated June 3d, A. D. 1869, executed by the Decatur and East St. Louis Railroad Company to Isaac H. Knox, as trustee, to secure the payment of bonds amounting to $2,700,000, with interest at seven per cent. per annum thereon. Said mortgage became a lien on all said railroad extending from Decatur, Illinois, to East St. Louis, Illinois.

A deed of trust, dated May 17, 1879, executed by the Wabash Railway Company to Solon Humphreys and Daniel A. Lindley, as trustees, to secure the payment of bonds amounting to $2,000,000, with interest at the rate of seven per cent. per annum, which deed of trust became a lien, subject to other prior liens, on the following lines of railroad, with all their franchises, property, issues, rents, and profits: All the railroad of said Wabash Railway Company extending from the city of Toledo, Ohio, through the State of Indiana, and thence into the State of Illinois to Meredosia, with branch of said road to Naples and East Hannibal, and from Meredosia to Camp Point, in the State of Illinois, and with branch of said road from Clayton to the east bank of the Mississippi river at Hamilton, in said State, and with branch of said road leading from Decatur to East St. Louis, in the same State. Said interest was paid up to October 1st, 1884.

A deed of trust, dated May 16, 1879, executed by the Wabash Rail-

way Company to Alfred T. White, as trustee, to secure the
468 payment of bonds amounting to $500,000, with interest at seven per cent. per annum. Said deed of trust became a first lien on all of said railroad extending from Naples, Illinois, to East Hannibal, Illinois, and was given to secure the purchase-money of said property.

A deed of trust, dated March 9, 1865, executed by the North Missouri Railroad Company to Edwin D. Morgan and Louis H. Meyer, as trustees, to secure the payment of bonds amounting to $6,000,000, with interest thereon at the rate of 7 per cent. per annum. Said deed of trust became a lien on all that portion of the railroad of the Wabash Company extending from St. Louis, Missouri, to Coatsville, Missouri, and from Moberly, Missouri, to North Missouri Junction, about eight miles from Kansas City, Missouri. The railroad embraced in said deed of trust is about 354.1 miles in length.

A deed of trust, dated August 12, A. D. 1874, executed by the St. Louis, Kansas City and Northern Railway Company to the Farmers' Loan and Trust Company of the City of New York, as trustee, to secure the payment of bonds amounting to $3,000,000, with interest thereon at 7 per cent. per annum. Said mortgage became a lien on all the railroad of the St. Louis, Kansas City and Northern Railway Company in the State of Missouri, being 353 miles in length, as then constructed from North Market street, in the city of St. Louis, to the southern boundary line of the State of Iowa, and from
469 Moberly, Missouri, to North Missouri Junction, in Clay county, Missouri, and as the same might be thereafter constructed through Clay county, a distance of about eight miles, to the bridge across the Missouri river at Kansas City, in Jackson county, Missouri.

Also as the same might then or thereafter be located in or through the county of St. Louis, to connect with the Union depot in said city; also as the same might then or thereafter be located south of North Market street, in said city of St. Louis, together with all real estate, right of way, shops, rolling stock, depots, appurtenances, property, and franchises of said company.

Also certain blocks and lots of land, structures, and buildings described in said mortgage, a copy of which is marked sub-Exhibit "F" No. 14 and is filed with the amended bill of the Wabash, St. Louis and Pacific Railway Company, consolidated, in this cause.

A mortgage, dated October 1st, A. D. 1878, executed by the St. Louis, Kansas City and Northern Railway Company to Henry F. Vail and Charles Parsons, as trustees, *the* secure the payment of bonds amounting to $1,000,000, with interest at 6 per cent. per annum, which interest has been paid to October 1st, 1885; which said mortgage became a lien on all the bridge of said last-named company, and all franchises thereof, and all the real estate, approaches, and appurtenances thereof, situated in the county of St. Louis, on the south side of the Missouri river, and in the county of St. Charles, on the north side of said river, in the State of Missouri.

470 A deed of trust executed by the St. Louis, Kansas City and Northern Railway Company on the 9th day of July, A. D.

1878, to Solon Humphreys and George A. Leighton, as trustees, to secure the payment of bonds amounting to $388,500, with interest at the rate of 7 per cent. per annum, which interest has been paid up to October 1st, 1885. Said deed of trust became a second lien on all the bridge franchises and property last above described.

A deed of trust, dated February 15th, A. D. 1879, executed by the St. Louis, Kansas City and Northern Railway Company to the United States Trust Company of New York, as trustee, to secure the payment of bonds amounting to $2,350,000, with interest thereon at the rate of 7 per cent. per annum; that said deed of trust became a lien on a line of railroad purchased by said last-named company from the Council Bluffs and St. Louis Railroad Company, a corporation of the State of Missouri, extending from Elm Flats, in Daviess county, Missouri, in a northwesterly direction through the counties of Daviess, Gentry, Nodaway, and Atchison, in said State, to the boundary line between the States of Missouri and Iowa, a distance of 78 miles; and said deed of trust also became a lien on the leasehold interest of said St. Louis, Kansas City and Northern Railway Company in and to a certain other line of railroad extending from Council Bluffs, in the State of Iowa, in a southeasterly direction through the counties of Pottawattamie, Mills, Fremont, and Page, in said State, to the boundary line between the States of Iowa and Missouri, a distance of 65 miles, said last-mentioned railroad
471 having been leased by said St. Louis, Kansas City and Northern Railway Company from the Council Bluffs and St. Louis Railway Company, a corporation of the State of Iowa, as said railroad was then or might thereafter be constructed, together with all franchises, rights, and other appurtenances thereto belonging.

A guaranty mortgage, dated February 15th, A. D. 1879, executed by the Council Bluffs and St. Louis Railway Company to the United States Trust Company of New York, intended to further secure the principal and interest of the issue of bonds last before mentioned. Said mortgage became a lien on all the right, title, and interest of said Council Bluffs and St. Louis Railway Company in and to the line of railroad last aforesaid, commencing at Council Bluffs, Iowa, and extending to the boundary line between the States of Iowa and Missouri, with all the rights, franchises, and property of mortgagor company therein, as then or thereafter constructed.

A deed of trust, dated July 15, 1879, executed by the St. Louis, Kansas City and Northern Railway Company to George I. Seney, of New York, to secure bonds amounting to $264,000, with interest thereon at the rate of 6 per cent. per annum. Said trust deed became a lien on all that part of said railroad extending from Roseberry, Missouri, to the State line between the States of Missouri and Iowa, being 10.1 miles in length, and also upon all the right, title, and interest of said grantor company in and to that portion of railroad between said State line and Clarinda, Iowa, a distance of 11.4 miles,
472 which said grantor company acquired from the Clarinda and St. Louis Railroad Company of Iowa.

A guaranty trust deed, dated July 15, 1879, executed by the Clarinda and St. Louis Railroad Company to George I. Seney, as trustee,

to secure the payment of bonds amounting to $264,000, with interest at 6 per cent. per annum, being the bonds last aforesaid, which deed of trust became a lien on all the right, title, and interest of said last-mentioned company in the railroad commencing at the town of Clarinda, in the State of Iowa, and extending in a southerly direction through the county of Page, in the State of Iowa, to the boundary line between the States of Iowa and Missouri.

A deed of trust, dated July 1st, 1879, executed by the Champaign, Havana and Western Railroad Company to Henry W. Ford and Richard S. Brock, as trustees, intended to secure the payment of bonds amounting to the sum of $1,450,000, of which $340,900 are now outstanding, with interest thereon at the rate of 7 per cent. per annum, which deed of trust became a lien on the railroad, property, and franchises of said grantor company, extending from the city of Champaign, in the county of Champaign, in the State of Illinois, running thence by way of White Heath, Clinton, Lincoln, and Mason City to Havana, near the east bank of the Illinois river, with a branch extending from White Heath to Decatur, all said points being in the State of Illinois and said railroad and branch being of the aggregate length of 131 miles.

A deed of trust, dated on the first day of December, A. D.
473 1880, executed by the Wabash, St. Louis and Pacific Railway Company to Henry F. Spaulding and John T. Terry, as trustees, intended to secure the payment of bonds amounting to $1,600,000, with interest thereon at the rate of 6 per cent. per annum, of which bonds so intended to be secured only $1,200,000 were ever issued. Said deed of trust became a lien on the railroad and franchises last above described, and said bonds were issued for the purpose of being exchanged for the bonds last above described.

A deed of trust, dated February 6th, 1880, executed by the Centreville, Moravia and Albia Railroad Company to the Farmers' Loan and Trust Company, as trustee, to secure bonds amounting to $400,000, with interest thereon at six per cent. per annum, which deed of trust became a lien on the railroad and franchises of the last-named railroad company, projected to extend from a junction with the railroads of the Missouri, Iowa and Nebraska Railroad Company in the vicinity of Centreville, Appanoose county, Iowa, to a junction with the railroad of the Central Iowa Railway Company in the vicinity of Albia, Monroe county, Iowa, being about twenty-four miles in length.

A deed of trust, dated March 1st, 1881, executed by the Missouri, Iowa and Nebraska Railway Company to the Mercantile Trust Company of New York, as trustee, to secure the payment of bonds amounting to $2,269,000, with interest thereon at the rate of six per cent. per annum, and which deed of trust became a lien upon the railroad, franchises, and property of said last-named company, extending from Keokuk, Lee county, Iowa, to the south line of said county and State; thence through the counties of Clark,
474 Scotland, and Schuyler, in the State of Missouri, to the north line of said State; thence through the counties of Appanoose,

Wayne, and Decatur to Van Wert, Iowa; said line being about 143½ miles in length.

That said deed of trust by its terms referred to a certain prior deed of trust, dated June 1st, 1870, executed by the Missouri, Iowa and Nebraska Railway Company to the Farmers' Loan and Trust Company, as trustee, to secure an issue of bonds amounting to $3,025,000, with interest, and being a lien on the same property, in whole or in part. The said deed of trust of March 1st, 1881, and the deed of trust of June 1st, 1870, are to be taken together as representing substantially the same debt, and are to be taken together with any judgment or decree rendered by any competent court upon any of the bonds thereby secured.

A deed of trust, dated May 22, 1880, executed by the Toledo, Peoria and Western Railroad Company to Philip Henry Brown, Robert C. Martin, and John Paton, as trustees, to secure the payment of an issue of bonds amounting to $4,500,000, with interest thereon at seven per cent. per annum. Said deed became a lien on the railroad, franchises, and property of said last-named company, extending from a point at the eastern boundary of the State of Illinois, where it connects with the Toledo, Logansport and Burlington railway, and extending westwardly to the western boundary of the State of Illinois, in the city of Warsaw and in the town of Hamilton, Illinois, on the Mississippi river, and also from La Harpe to Burlington, Iowa, in the State of Iowa. The said company was
475 a corporation of the State of Illinois, and not of Missouri, as by mistake stated in the amended bill of the Wabash Company. This court does not by this decree determine whether said last-mentioned deed of trust did or did not become a lien on any property in the city of Burlington, Iowa.

A deed of trust, dated May 22, 1880, executed by said Toledo, Peoria and Western Railroad Company to Charles E. Whitehead, J. P. Giraud Foster, and William Hill, as trustees, to secure issues of income bonds aggregating to 3,900,000, with interest at the rate of 4 per cent. per annum, which deed of trust became a lien on all the railroad, franchises, and property last above described, but subject to the lien of the trust deed last above described.

A deed of trust, dated July 1, 1880, executed by said Wabash Railway Company to Henry F. Spaulding and John T. Terry, as trustees, to secure bonds amounting to $4,500,000, with interest at 5 per cent. per annum; that said trust deed became a lien on the railroad, franchises, and property, extending from Effingham, in the county of Effingham, Illinois, by way of Strawn, in Livingston county, in said State, to Streator, in the county of La Salle, with a branch to Altamount, Illinois, being the railroad formerly known as the Chicago and Paducah railroad; and also upon the railroad formerly known as the Chicago and Strawn railway, extending from Strawn aforesaid to or near Chicago, Illinois. Said bonds so secured were issued for the purchase-money of the railroad, franchises, and property described therein.

A deed of trust, dated May 31, 1881, executed by the
476 Humeston and Shenandoah Railroad Company to W. J. Ladd

and John T. Terry, as trustees, to secure bonds amounting to $2,684,000, with interest at the rate of 7 per cent. Said mortgage became a lien on the railroad, franchises, and property of said last-named company, extending from a point at Humeston, Iowa, 100 feet west of where the Chicago, Burlington and Quincy railroad crosses the Missouri, Iowa and Nebraska railroad, thence west to Shenandoah, Iowa, about 112 miles, with all its property and franchises.

A deed of trust, dated February 28, 1881, executed by the Des Moines Northwestern Railway Company to the Central Trust Company of New York and James Cheney, as trustees, for the purpose of further securing a portion of the bonds issued by the said Wabash Company and secured by its general mortgage aforesaid. Said deed of trust became a lien on all the railroad property and franchises of said grantor company, extending from Des Moines, in the State of Iowa, to Fonda, in said State, a distance of 114.9 miles, said railroad being a narrow-gauge road; also that the bonds secured by said deed of trust were so issued for the uses and purposes therein defined, and all rights, as between the Des Moines Northwestern Railway Company and any party to this cause or the receivers herein, arising from said mortgage or the lease of the railroad of said company to the Wabash Company, or the contract under which they were made, are hereby expressly reserved from the operation of this decree, and shall be hereafter enforced only in some court having jurisdiction of the property covered by said lease and mortgage.

And any claim that the receivers herein may set up against said Des Moines Northwestern Railway Company or the property
477 thereof shall be litigated in some court having jurisdiction of said railroad; and any claim of said railroad company against said receivers or the property in their possession may be litigated in the circuit court of the United States for the southern district of Iowa, eastern division.

A deed of trust, dated February 17, 1881, executed by the Attica, Covington and Southern Railway Company of Indiana to the Central Trust Company of New York and James Cheny, as trustees, to further secure a portion of the general mortgage bonds of the Wabash Company, secured by the general mortgage aforesaid; that said deed of trust became a lien on the railroad property and franchises of said Attica, Covington and Southern Railway Company of Indiana, extending from Attica, Fountain county, Indiana, to Covington, in said county, a distance of 14.5 miles, and the bonds thereby secured were equal to ten thousand dollars for each mile of said road.

A deed of trust, dated October 1, 1881, executed by the Wabash, St. Louis and Pacific Railway Company to the Mercantile Trust Company of New York, as trustee, to secure bonds amounting to $3,857,000, with interest at the rate of five per cent. per annum. Said deed of trust became a lien on the Cairo Division of the Wabash, St. Louis and Pacific Railway Company, extending from Danville, Illinois, to St. Francisville, in said State, and from Vincennes, Indiana, by way of St. Francisville to Cairo, Illinois, with all

the property thereof. Said bonds were issued in payment of the purchase-money of said railroad and property.

A deed of trust, dated April 1, 1879, executed by the St. Louis Bridge Company to J. C. Rogers and C. E. Tracy, as trustees, to secure an issue of bonds amounting to $5,000.000, with interest thereon at the rate of seven per cent. per annum, which deed of trust
478 became a lien on the property of said St. Louis Bridge Company, as therein described.

A deed of trust, dated November 3d, 1881, executed by the said Wabash Company to the Mercantile Trust Company of New York and James Cheney, as trustees, to secure bonds amounting to about $2,052,000, with interest thereon at six per cent. per annum; that said deed of trust became a lien on that portion of the railroad of the Wabash Company formerly known as the Detroit, Butler and St. Louis railroad, extending from a point on the Detroit, Grand Haven & Milwaukee railroad in or at Detroit, Michigan, where the said Detroit, Butler and St. Louis railroad intersects it, and running thence in a southwesterly direction through the counties of Wayne, Washtenaw, Monroe, and Lenawee, in Michigan, and the counties of Fulton and Williams, in Ohio, and the county of De Kalb, in Indiana, to Butler, in said State, being about 114 miles in length, with all the property and franchises pertaining to said railroad and all property then in possession or which might be thereafter acquired for the convenience of said railroad and its business; that said trust deed was also given to remove all doubts as to the validity of a prior trust deed between the same parties and was given to secure the purchase-money of said railroad and property.

A deed of trust, dated February 1st, 1881, executed by the Peoria and Pekin Union Railway Company to the Central Trust Company of New York, as trustee, to secure bonds amounting to $1,500,000, with interest at the rate of six per cent. per annum. Said deed of trust became a lien on the property and franchises of said Peoria and Pekin Union Railway Company; also a second mortgage
479 executed by said last-named company to the Central Trust Company of New York, as trustee, dated February 1st, 1881, to secure an issue of income bonds amounting to $1,500,000, with interest not exceeding six per cent. per annum; that said deed of trust became a lien on all said property last aforesaid, subject to the superior lien of said prior mortgage or trust deed.

A deed of trust, dated January 1st, 1867, executed by the Chicago, Cincinnati and Louisville Railroad Company to George T. M. Davis, as trustee, to secure bonds amounting to $1,000,000, with interest at the rate of seven per cent. per annum. Said deed of trust became a lien on all the railroad, franchises, and property of said last-named company, extending from Peru, Indiana, to La Porte, Indiana, a distance of 71.51 miles, such lien operating on said line whether then or thereafter constructed.

A deed of trust, dated June 1st, 1871, executed by the Indianapolis, Peru and Chicago Railway Company to Clifford A. Hand, as trustee, to secure bonds amounting to $275,000, with interest thereon at the rate of seven per cent. per annum. The said deed of trust be-

came a lien on the railroad, property, and franchises of said last-named company, extending from Indianapolis, in the county of Marion, Indiana, through the counties of Hamilton, Tipton, and Howard, to the city of Peru, in the county of Miami, Indiana, a distance of seventy-five miles.

A certain other second deed of trust, dated June 1st, 1881, executed by said last-named railroad company to Wager Swayne
480 and Abram W. Hendricks, as trustees, to secure an intended issue of bonds not to exceed $2,275,000, of which only $2,000,000 were ever issued, with interest thereon at the rate of six per cent. per annum. Said deed of trust became a lien on the railroad, franchises, and property of said last-named company, being the railroad and property last described.

A deed of trust, dated June 1st, 1881, executed by the Michigan City and Indianapolis Railroad Company to Abraham W. Hendricks and Wager Swayne, as trustees. Said deed of trust became a lien on the railroad, franchises, and property of said last-named railroad company, extending from Michigan City, in the county of La Porte, Indiana, to La Porte, in the same county, a distance of 12.75 miles. The said trust deed and the two trust deeds last before described are to be taken together as explaining each other.

A deed of trust, dated November 4, 1881, executed by the St. Louis, Jerseyville and Springfield Railroad Company to the Central Trust Company of New York and James Cheney, of Indiana, as trustees, to secure a portion of the said general mortgage bonds of the Wabash Company amounting to $15,000 for each mile of road embraced therein. Said deed of trust became a lien on the railroad, franchises, and property of the said St. Louis, Jerseyville and Springfield Railroad Company, extending from a point on the railroad of said Wabash Company at or near New Berlin or between New Berlin and Springfield, in Sangamon county, Illinois, to its terminus at Grafton or Jersey Landing, in Jersey county, Illinois, a distance of
71.4 miles, and that said bonds were issued to secure the per-
481 formance of the condition on which the Wabash Company acquired said railroad and property.

A deed of trust, dated December 1st, 1881, executed by the Des Moines and St. Louis Railroad Company to the Central Trust Company of New York and James Cheney, as trustees. Said deed of trust was given to further secure a portion of the aforesaid general mortgage bonds of the Wabash Company, amounting to $15,000 per mile for each mile of the railroad hereinafter described. Said deed of trust became a lien on the railroad branches and property of said grantor company extending from Albia, Iowa, to Des Moines, Iowa, a distance of 67.3 miles, and was given to secure the performance of the condition on which said Wabash Company acquired said railroad and property.

A deed of trust, dated March 1st, 1881, executed by the Champaign and Southeastern Railway Company to the Central Trust Company of New York and James Cheney, as trustees, to further secure a portion of the general mortgage bonds of the Wabash Company, amounting to $15,000 for each mile of the railroad hereinafter de-

scribed. Said trust deed became a lien on the railroad, franchises, and property of said grantor company, extending from Champaign, Illinois, to Sidney, Illinois, a distance of $11\frac{6}{10}$ miles, and was given to secure the conditions on which said railroad and property was acquired by said Wabash Company.

A deed of trust, executed September 1st, 1880, by the Wabash, St. Louis and Pacific Railway Company to J. P. Giraud Foster
482 and Edward K. Goodnow, as trustees, to secure the payment of seventy-three promissory notes for the sum of one thousand dollars each, with interest at the rate of six per cent. per annum. Said deed of trust was given to secure the purchase-money of the property described therein, and became a lien on lots 13, 13A, 14, 15, 15A, 16, 17, 18, 19, 20, 21, 22, 23, and 24, all in the original plot of the city of Burlington, in the county of Des Moines, Iowa, and upon all the railroad iron therein, and on all improvements and appurtenances thereof and all rents, issues, and profits thereof. The court further adjudges that four of said notes have been paid and satisfied, and further adjudges that the said deed of trust is a lien upon the property therein described superior to and free and clear of any lien or charges for the payment or contribution to the payment of any claims or demands whatever chargeable against such property herein.

A deed of trust, dated May 1st, 1873, made by the Boone County and Booneville Railway Company to J. M. Worden and R. A. Betts, as trustees, to secure bonds amounting to $100,000, with interest at 7 per cent. per annum. Said trust deed became a lien on a railroad extending from Columbia, Missouri, to Centralia, Missouri, a distance of about 21 miles.

A deed of trust, dated 1st of October, 1875, made by the St. Louis Ottumwa and Cedar Rapids Railway Company to Solon Humphreys and George S. Coe, as trustees, to secure bonds amounting to $322,500, with interest at the rate of 7 per cent. per annum. Said deed of trust became a lien on a line of railroad extending from
483 Ottumwa, Iowa, to its intersection with the St. Louis, Kansas City and Northern railway at the Missouri State line.

A deed of trust, dated August 1st, 1878, executed by the Brunswick & Chillicothe Railroad Company to George M. Rice, J. Kimball, and E. P. Burnham, as trustees, to secure bonds amounting to $304,500, with interest at the rate of 6 per cent. per annum. Said deed of trust became a lien on the railroad of said grantor company from its intersection with the St. Louis, Kansas City and Northern railway at Brunswick, Missouri, to Chillicothe, Livingston county, Missouri, a distance of about 36 miles.

A deed of trust, dated September 14, 1872, executed by the St. Louis, Council Bluffs and Omaha Railroad Company to James B. Eads and J. A. Jamison, as trustees, to secure bonds to the amount of $626,000, with interest at the rate of 6 per cent. per annum. Said trust deed became a lien on the line of railroad extending from Chillicothe, Missouri, to a point at or near Pattonsburg, Daviess county, Missouri, being about 43 miles in length.

A deed of trust, dated October 1st, 1879, executed by the Quincy,

Missouri and Pacific Railroad Company to Solon Humphreys and Orville H. Browning to secure bonds amounting to $1,204,000, with interest at the rate of 6 per cent. per annum. Said deed of trust became a lien on the line of railroad extending from a point in Missouri opposite the city of Quincy, Illinois, to Trenton, Missouri, a distance of about 134 miles.

A deed of trust, dated October 1st, 1879, executed by the
484 Quincy, Missouri and Pacific Railroad Company to Amos Green and Charles H. Bull, as trustees, to secure income bonds to an amount not exceeding $2,000,000, with interest thereon at the rate of 6 per cent. per annum, if earned. Said deed became a lien on the line of railroad last above described.

A lease made by Eel River Railroad Company to the Wabash Company, dated August 26, 1879, of a railroad extending from Butler, Indiana, to Logansport, Indiana, on which rent was paid to June 1st, 1884.

A lease of the Quincy, Missouri and Pacific railway by Wabash Company, August 21, 1879; said railroad intended to extend from West Quincy, Missouri, to some point on the Missouri river, but never constructed west of Trenton, Missouri, said rent being paid to January 1st, 1884.

A lease of the St. Joseph and St. Louis railroad, dated June 1st, 1874, to St. Louis, Kansas City and Northern Railway Company, said road extending from St. Joseph, Missouri, to North Lexington, in said State, the said rent being paid to March 1st, 1884.

A lease of the Boone County and Boonville railroad to the St. Louis, Kansas City and Northern Railway Company, dated May 1st, 1873. Said railroad extends from Centralia, Missouri, to Columbia, Missouri, and said rental was paid to May 1st, 1885.

A lease of the St. Louis, Ottumwa and Cedar Rapids railway to the St. Louis, Kansas City and Northern Railway Company, dated October 1st, 1875. Said railroad extends from Coatsville, Missouri, to Ottumwa, Iowa, and said rent was paid to October 1st, 1884.

A lease of the St. Louis, Council Bluffs and Omaha railroad
485 to the St. Louis, Kansas City and Northern Railroad Company, executed June 20th, 1878. Said railroad extends from Chillicothe, Missouri, to Pattonsburg, Missouri; said rent being paid to January 1st, 1885.

A lease of the Brunswick and Chillicothe railroad to the St. Louis, Kansas City and Northern Railway Company, dated August 1st, 1878. Said railroad extends from Brunswick, Missouri, to Chillicothe, Missouri, and said rental is paid to August 1st, 1885.

A lease of the Council Bluffs and St. Louis railway (in Iowa) to St. Louis, Kansas City and Northern Railway Company, dated February 10, 1879. Said railroad extends from Council Bluffs, Iowa, to the State line between Missouri and Iowa, and said rent was paid to October 1st, 1884.

A lease of the Clarinda and St. Louis railroad to the St. Louis, Kansas City and Northern Railway Company, dated July 15, 1879. Said railroad extends from Clarinda, Iowa, to the State line between Iowa and Missouri. Said rent is paid to August 1st, 1884.

Lease by the Chicago and Western Indiana Railroad Company to the Wabash Company, dated October 25th, 1879, and a supplemental lease or contract, dated November 1st, 1882, by the Chicago and Western Indiana Railroad Company to the Wabash Company, in which Anthony J. Thomas and Charles Edward Tracy are made parties of the third part, as trustees.

A lease of the Centreville, Moravia & Albia railroad to the Missouri, Iowa and Nebraska Railway Company, dated February 6th, 1880. Said railroad extends from Centreville, Iowa, to Albia, Iowa, and said rental is paid up to January 1st, 1884.

486 A lease of the Missouri, Iowa and Nebraska railroad to the Wabash Company, dated September 3d, 1880. Said railroad runs from Keokuk, Iowa, to Van Wert, Iowa, and said rent is paid up to March 1st, 1884.

A lease of the Toledo, Peoria and Western railroad to the Wabash Company, dated May 22d, 1880. Said railroad has been hereinbefore described. The said rent was paid to April 1st, 1884.

A lease of the Humeston and Shenandoah railroad to the Wabash Company and Chicago, Burlington and Quincy Railroad Company, dated April 1st, 1881. Said railroad has been hereinbefore described.

A lease of the Des Moines Northwestern railroad to the Wabash Company, dated February 28th, 1881. Said railroad has been hereinbefore described, and said rent has been paid to December 1st, 1883.

A lease of the Attica, Covington and Southern railroad to the Wabash Company, dated July 18th, 1881. Said railroad has been hereinbefore described, and said rent was paid up to December 1st, 1883.

A lease of the St. Louis bridge and tunnel to the Wabash Company and Missouri Pacific Railway Company, dated July 1st, 1881; also includes other stipulations and provisions.

A lease of the Peoria and Pekin Union railroad to the Wabash Company and other companies, dated February 1st, 1881. This includes other stipulations and provisions. The property embraced in said instrument has been hereinbefore described.

487 A lease of the Indianapolis, Peru and Chicago railway to the Wabash Company, dated June 1st, 1881. Said railroad has been hereinbefore described, and said rental has been paid up to December 1st, 1883.

A lease of the Indianapolis and Michigan City railroad to the Wabash Company, dated June 1st, 1881. Said railroad has been hereinbefore described, and said rental has been paid up to December 1st, 1883.

A lease of the St. Louis, Jerseyville and Springfield railroad to the Wabash Company, dated November 22, 1880. Said railroad has been hereinbefore described, and said rental was paid up to December 1st, 1883.

A lease of the Des Moines and St. Louis railroad to the Wabash Company, dated March 1st, 1882. Said railroad has been herein-

herein and all other claims which said courts or some of them may adjudge to be superior to said bonds, and to the payment of all labor and supply claims falling within the order of this court of May 29, 1884, which now are or may be unpaid.

503 Third. In payment of all expenses incurred by the committee of bondholders and the purchasing committee in bringing about the said agreement between the holders of the general mortgage bonds and the holders of the collateral trust bonds, and of carrying the same into effect, and generally in the reorganization of the Wabash Company, including a proper remuneration for the members of said committee.

Fourth. To the payment of the two classes of bonds aforesaid *pro rata* as far as the same can be paid in whole or in part out of the proceeds of said sale or sales or by the application of the bonds aforesaid in lieu of purchase-money under the provisions of this decree relating thereto.

Edmund T. Allen is hereby appointed commissioner to execute this decree. He shall make and file in this court an affidavit faithfully and impartially to execute this decree and to obey the orders of this and the other courts aforesaid in the discharge of the duty hereby imposed. All claims and demands against said property or said receivers or the proceeds of said sales not hitherto or herein adjudged and determined, whatever the character of such claims and demands, are hereby reserved for future action by this and said other courts; and all questions arising under any answers of parties hereto and on all cross-bills and other pleadings or intervening petitions not herein or heretofore determined are hereby reserved for future adjudication, the settlement of the same being held not necessary to the purposes of this decree.

It is further ordered that the Central Trust Company of New
504 York and James Cheney and the Mercantile Trust Company of New York or some of them present this decree to the other courts entertaining ancillary jurisdiction of the said consolidated cause, and pray that the same be approved by said courts and entered as the decree thereof.

All bids conditionally accepted by said commissioner for any railroad property or interest ordered to be sold by this decree shall be reported to said courts, as their several jurisdictions may require, and be subject to confirmation or rejection by said courts.

The court also adjudges that the indemnity mortgage referred to in the bills of complaint herein made by the Wabash Company to the St. Louis, Iron Mountain and Southern Railway Company is subject and inferior to the lien of the general mortgage and collateral trust.

The statements in this decree of the amount of bonds outstanding or of interest or rental paid or unpaid on any of the mortgages, deeds of trust, leases, or contracts herein declared to be superior to the lien of the general mortgage or collateral trust, shall not be taken as adjudicating or determining the matters so stated. Such amounts are so stated in this decree only for the purpose of enabling persons who may desire to purchase said property

to determine approximately the amount of prior liens or other charges upon said property and each part thereof.

It is ordered that said commissioner make full report of his doings to this court.

(Signed) DAVID J. BREWER,
Circuit Judge.
SAMUEL TREAT,
District Judge.

505 *Stipulation of Parties.*

In the Circuit Court of the United States for the Eastern District of Missouri.

CENTRAL TRUST COMPANY OF NEW YORK *et al.*
vs.
WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.*

In re intervening petition of St. Joseph & St. Louis Railroad Company for recovery of rental.

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

D. B. Howard, being first duly sworn, upon his oath states that prior to May 29th, 1884, he was the auditor of the Wabash, St. Louis & Pacific Railway Company, and that since said date he had been the auditor of Solon Humphreys and Thomas E. Tutt, the receivers of the property of said company, and that as said auditor he has had charge of their books and accounts and is familiar with said books and with the several reports from time to time made therefrom and filed in the above-entitled cause. Affiant further states that the following facts appear from the several reports of said receivers made, filed, and approved by the court in said cause, to wit:

1st. It appears that the total of the labor and supply debts of the said Wabash, St. Louis & Pacific Railway Co. existing when said receivers were appointed, on the 29th day of May, 1884, together with the taxes due on said property and the other preferential indebtedness of said company existing at said date, and
506 which said receivers were by the order of their appointment directed to pay and have paid, amounted to the sum of $4,417,491.

2nd. It appears that the total net earnings of the entire system of railroad operated by said receivers from the date of their appointment, on the 29th day of May, 1884, to the 16th day of April, 1885, amounted to the sum of $1,175,653.21.

3rd. It appears that the net earnings of said system from the date of the appointment of said receivers, on the 29th day of May, 1884, to the 24th day of April, 1886, the date on which the St. Joseph & St. Louis railroad (which had previously been operated by said

receivers as a part of said system) was surrendered to said St. Joseph & St. Louis Railroad Co., amounted to the sum of $2,819,131.40.

D. B. HOWARD.

Subscribed and sworn to before me, the undersigned, a notary public within and for the city of St. Louis, this 13th day of October, A. D. 1888.

[SEAL.] MILLARD F. WATTS,
Notary Public.

For the purpose of abbreviating the record it is stipulated and agreed by and between the parties to this intervening cause that the above and foregoing affidavit of D. B. Howard may be inserted in the record as evidence of the facts therein stated instead of the several voluminous reports of said receivers from which said facts appear.

PATTISON & CRANE,
Attorneys for Appellant.
WELLS H. BLODGETT,
Attorney for Respondent.

On the 26th day of April, 1886, the property covered by the decree was sold to James F. Joy, O. D. Ashley, Thomas H. Hubbard, and Edgar T. Welles, trustees, for $625,000, subject to the terms and conditions of said decree of foreclosure and sale.

The report of sale was filed by the commissioner on the 28th day of April, 1886, and the same was confirmed by an order of the court entered on the 15th day of June, 1886. Said order of confirmation is in words and figures as follows, to wit:

507 In the Circuit Court of the United States for the Eastern District of Missouri.

At a stated term of the circuit court of the United States for the eastern district of Missouri, in the eighth circuit, held at the United States court-house, in the city of St. Louis, on the 15th day of June, in the year of our Lord one thousand eight hundred and eighty-six.

Present: Hon. D. J. Brewer, circuit judge; Hon. Samuel Treat, district judge.

THE CENTRAL TRUST COMPANY OF NEW YORK and JAMES CHENEY, Complainants,
vs.
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY and Others, Defendants.
} In Equity. Consolidated Cause.

Decree Confirming Report of Sale.

And now, on this day, this cause came on further to be heard upon the application of the complainants herein, The Central Trust Com-

pany of New York and James Cheney, to confirm the sale made
508 herein on the 26th day of April, 1886, by Edmund T. Allen, Esq., the commissioner appointed in and by the decree of this court heretofore entered in this suit at the September term, A. D. 1885, among other things, to sell the premises, franchises, and property in and by said decree directed to be sold; and said commissioner having made his report in writing to this court, which report bears date the 26th day of April, 1886, in and by which it appears that said commissioner, after due notice of said sale made as required by law and the rules of this court, proceeded to make sale of and did sell the said premises, franchises, and property at public sale between the hours of 10 a. m. and 4 p. m. on Monday, the 26th day of April, 1886, at the east door of the United States court-house, on Eighth street, in the city of St. Louis, in the State of Missouri, on which sale all and every of the said premises, franchises, and property in and by said decree directed to be sold were sold, as hereinafter stated, except the leasehold interests of the said Wabash, St. Louis and Pacific Railway Company in the following railroads, to wit:

The Council Bluffs and St. Louis railway, extending from the Iowa State line to Council Bluffs; that portion of the Clarinda and St. Louis railway in the State of Iowa; the Des Moines and St. Louis railroad; the Eel River railway; the St. Louis, Jerseyville and Springfield railroad; the Attica, Covington and Southern railroad, and the Champaign and Southeastern railroad, for none of which there were any bidders, and that the leasehold interest of the Wabash, St. Louis and Pacific Railway Company in the St. Joseph and St. Louis railway was sold to William F. Nesbitt for the sum of one dollar, he being the highest bidder and that sum being the highest sum bidden therefor, and that all the rest and residue and remainder of said premises, franchises, and property were sold to James F.
Joy, O. D. Ashley, T. H. Hubbard and Edgar T. Welles,
509 trustees, for the sum of six hundred and twenty-five thousand dollars, they being the highest bidders and that sum being the highest sum bidden therefor, and that the said purchasers had deposited ten per cent. of the amount of said bids in the Third National Bank, in the city of St. Louis, subject to the order of said commissioner;

And upon producing the said report of the commissioner of the said sale, which was filed on the 28th day of April, 1886, and no exceptions to said report having been filed, and sufficient notice of the hearing of said application having been given to the solicitors for the parties to this cause, and the court having fully examined the said report of the said commissioner of said sale and his doings in pursuance of the decree of the sale herein, and finding the same correct and in all respects in conformity to law and with the orders of this court, and that the amount bid at said sale, as reported by the said commissioner in said report of sale, to wit, the sum of six hundred and twenty-five thousand and one dollars, was the highest and best bid for the premises and property, rights, and franchises so ordered to be sold by him at said time—

It is now, therefore, ordered, adjudged, and decreed that the said

sale be, and the same is hereby, ratified and confirmed, subject to the terms and conditions hereinafter named, and all proceedings of the said commissioner in that regard are hereby approved and confirmed.

And it is further ordered, adjudged, and decreed that James F. Joy, Thomas H. Hubbard, Edgar T. Welles, and O. D. Ashley, the purchasers aforesaid, shall deposit on or before August 1st, 1886, in the Third National Bank, in the city of St. Louis, subject to the order of said commissioner, the further sum of five hundred and sixty-two thousand five hundred dollars, being the full amount remaining unpaid of the aggregate of their several bids reported by said commissioner.

510 And it is further ordered, adjudged, and decreed that as a further condition of the taking effect of this order and before the said sale shall stand as finally confirmed the purchasers last above named shall procure from the trustees of the general mortgage of the Wabash, St. Louis and Pacific Railway Company surrenders and cancellations of the following leasehold interests, reported by the master as offered for sale and not sold, to wit: The leasehold interest in the Council Bluffs and St. Louis railroad; the leasehold interest in the Attica, Covington and Southern railway; the leasehold interest in the Clarinda and St. Louis railroad; the leasehold interest in the Des Moines and St. Louis railroad; the leasehold interest in the St. Louis, Jerseyville and Springfield railroad; the leasehold interest in the Champaign and Southeastern railroad; and shall also procure the consent of The Wabash, St. Louis and Pacific Railway Company, defendant, and of the said several lessors to the surrender and cancellation of each of said several leases, which shall also be entered of record in this cause; and any deficit or loss incurred by the receivers herein from the operation of any of said railroads, as also of the Eel River railway, from the first day of June, 1886, shall, as a further condition of the confirmation of said sale, be charged upon the interest of said purchasers in the property acquired by them at said sale.

And it is further ordered, adjudged, and decreed that the said commissioner be, and he hereby is, ordered and directed, upon compliance by said purchasers with the conditions above set forth, to execute and deliver a proper deed or deeds of conveyance of all and singular the said premises, franchises, and property so as aforesaid sold to the said purchasers or their assigns, and also to said William F. Nesbitt.

511 And it is further ordered, adjudged, and decreed that this decree of confirmation of the sale of the premises and property, rights, and franchises as aforesaid and the deeds hereinbefore ordered to be made shall be subject to the terms and provisions of the decree of sale heretofore entered in this cause, whereby it is provided, in addition to the sums required by said decree of sale and by this order to be paid into court in cash, that there should be paid such further sums as may be needed and as this court may direct in order to meet claims which this court may adjudge in this case to be prior in equity to the mortgages foreclosed by said decree, and

whereby the court directed that the railroads, property, or interests sold thereunder should remain in the custody of the receivers until such time as the court should, on motion, direct said property in whole or, from time to time, in part to be released to said purchasers, and should afterwards be subject to be retaken and, if necessary, resold if the sums so charged or to be charged against said property or any part thereof or said receivers, as therein provided, should not be paid within a reasonable time after being required by order of the court, and that the conveyance and transfer of said property should be subject to the power and jurisdiction of the court, and the purchasers of any part of said property should thereby become and remain subject to said jurisdiction as far as necessary to the enforcement of said decree, and such jurisdiction should continue until all the claims and demands that have been or may be allowed against said property or any part thereof or said receivers by order of the court should be fully paid and discharged, and that the provisions aforesaid should apply to the purchasers at said sale and to all persons taking said property through or under them, and shall be further subject to all the terms and conditions of said decree of sale.

(Signed) DAVID J. BREWER,
Circuit Judge.

(Signed) SAMUEL TREAT,
District Judge.

512 On the 20th day of September, 1886, the commissioner filed his report, setting forth that said Joy *et als.*, trustees, had fully complied with the terms of said order of confirmation and had paid over to said commissioner the sum of $625,000 by them bid for the property purchased by them as aforesaid. With said report said commissioner filed forms of deeds to be executed by him to the purchaser at said sale.

On the 21st day of September, 1886, said last-mentioned report came on to be heard before the court and was confirmed, and the commissioner was ordered and directed to execute and deliver to said "purchasing committee," Joy *et als.*, proper deeds to the property purchased by them as aforesaid, and the form of said deeds was approved.

The Central Trust Company of New York and James Cheney, as trustees in said "general mortgage;" The Mercantile Trust Company, as trustees of the collateral trust mortgage; said Wabash, St. Louis and Pacific Railway Company, and Solon Humphreys and James F. How (as trustees of certain real estate) were also by said last-mentioned order directed to severally and in due form convey to said purchasers all their interest as trustees and as mortgagors in and to the property sold by said commissioner to said purchasers.

The deeds so ordered to be executed have been executed and delivered as ordered and directed; but possession of the property was not delivered to the purchasers when said deeds were delivered.

On the 31st day of December, 1886, the following order was made in said cause by said court, to wit:

513 At a stated term of the circuit court of the United States for the eastern district of Missouri, held at the court-house, in the city of St. Louis, on the 31st day of December, 1886.

Present: The Honorable David J. Brewer and the Honorable Samuel Treat, judges.

THE CENTRAL TRUST COMPANY OF NEW YORK and JAMES CHENEY, Complainants, *vs.* THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.*, Defendants.	In Equity. Nos. 2357 and 2464. Consolidated Cause.

Order of Court Concerning Possession of Property under Decree of January 6th, 1886.

DECEMBER 31ST, 1886.

And now come James F. Joy, Ossian D. Ashley, Thomas H. Hubbard, and Edgar P. Wells, and submit their petition, praying that the court will direct that all the property purchased by them as a committee representing certain bondholders be turned over and be delivered to them, and submit also an order proposed in connection with said petition, and the court, having considered the same, does refuse to make the order so submitted, and thereupon the
514 court, of its own motion, does order, adjudge, and decree that the said purchasers as a committee as aforesaid shall, within sixty days from the entry of this order, pay into the registry of this court the sum of one million dollars in cash or in certificates now outstanding of Solon Humphreys and Thomas E. Tutt, receivers, and shall also, within the same period, as such committee, give bond or security, to be approved by this court, in the sum of one million dollars, conditioned to pay the full amount of the said receivers' indebtedness and other demands stated in the final decree herein, and to comply with all the further orders of this court; that such payment shall be made and security given by such purchasers in their capacity as a committee and as agents and not as individuals, and shall be made and given by the use of the moneys or means in their possession or control as such committee.

And the court doth further order and decree, upon making the payment and giving the security hereinbefore ordered, the said purchasers as such committee shall take and the said receivers shall deliver to them possession of the entire property purchased by them under the decree of foreclosure entered in this cause January 6th, 1886, and that such possession shall be subject to the right of this court to retake possession of said property or any part thereof on failure of said purchasers or their successors to comply with any further order of this court, and shall also be subject to all the terms and provisions of the said decree and of the order of this court heretofore made confirming the sale of said property under said decree.

DAVID J. BREWER,
Circuit Judge.

SAMUEL TREAT.
U. S. District Judge.

On the 30th day of March, 1887, the following order was made in said cause by said court, to wit:

515 In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

CENTRAL TRUST COMPANY OF NEW YORK *et al.*, Complainants, *vs.* WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY *et al.*, Defendants.	Nos. 2357 and 2464. Consolidated Cause. In Equity.

Order on Receivers to Turn Property over to Purchasing Committee.

MARCH 30TH, 1887.

Now, on the 30th day of March, 1887, this cause coming on for further hearing, and the receivers herein appearing by their counsel and the purchasing committee hereinafter mentioned appearing by their counsel and applying to the court for possession of the property heretofore purchased by them; and it appearing to the court from

RECITAL.—One million dollars already paid under order of December 31, 1886.

516 a report of the special master filed herein on the 5th day of March, 1887, that said purchasing committee, composed of the parties mentioned in the order entered in this cause by the court of its own motion on the 31st day of December, 1886, did, within sixty days from the date of said order and in pursuance thereof, pay into the registry of this court the sum of one million dollars in cash and the certificates of Solon Humphreys and Thomas E. Tutt, receivers; and the court having, on the 28th day of February, 1887, by an order duly entered herein, among other things directed that the giving of a bond or security by said committee, as required by said order of December 31st, 1886, be postponed without prejudice to the rights of said purchasers; and it further appearing to the court that said purchasing committee did, on the 27th of March, 1887, deposit to the credit of said receivers, Humphreys and Tutt, in the National Bank of Commerce in the city of New York, a further sum of two hundred and fifty thousand dollars in cash, to be used by said receivers in paying their certificates due prior to April 1st, 1887, at par and accrued interest; now, in consideration of the premises, it is ordered, adjudged, and decreed by the court—

A further sum of $250,000 paid March 27, 1887.

First. That said purchasing committee, as such, file their bond herein, conditioned that they will,

from moneys now in their hands as such committee (and not from the earnings of the railroads purchased by them), pay into the registry of this court or place to the credit of said receivers in some bank to be designated by said receivers the further sum of seven hundred and fifty thousand dollars ($750,000), to be used as the same may from time to time be required by said receivers to pay their own obligations, or such obligations of said Wabash, St. Louis and Pacific Railway Company as said receivers have been heretofore ordered or may be hereafter ordered to pay by the court.

Bond to be given in sum of $750,000.

Second. And in order to carry into effect the provisions of the foreclosure decree entered
517 herein on or about January 6th, 1886, and of the order or decree entered herein on or about June 15th, 1886, confirming the report of sale of certain property therein described to said purchasing committee, in which decrees it was among other things provided that said purchasing committee should, as a condition of their said purchase, pay such sums of money as might be needed and as this court or the other courts exercising ancillary jurisdiction in this cause might direct them to pay in order to meet claims which this court or said other courts might adjudge to be prior in equity to the mortgage foreclosed—

It is further ordered, adjudged, and decreed that said purchasing committee or their successors or assigns, from time to time, pay into the registry of this court or deposit in some bank in the city of St. Louis to the credit of said receivers such other and further sums of money in addition to said seven hundred and fifty thousand dollars as may be required and as the same may be required to pay all debts and liabilities of every kind contracted or incurred by said receivers in preserving, maintaining, improving, or operating the railroads and properties in their charge or incurred by said Wabash, St. Louis and Pacific Railway Company in maintaining and operating said railroads, and which debts and liabilities said receivers have been heretofore ordered or may be hereafter ordered to pay by this court or any of the other courts exercising ancillary jurisdiction in this cause.

Further sums to be deposited as required to pay receivers' indebtedness.

Third. It is further ordered, adjudged, and decreed that on the first day of April, 1887, said purchasing committee take possession of all the railroads and other property purchased by them under said foreclosure decree, wheresoever situated,

Committee to take possession April 1, 1887, of all lines purchased.

and said receivers are hereby ordered and directed to deliver to said purchasing committee or its assigns on the day last aforesaid all the railroads and other property of said Wabash, St. Louis and Pacific Railway Company, wheresoever situated, purchased by said committee whereof they took possession as receivers and which now remains in their possession or under their control.

Receivers to deliver to committee all lines in their possession purchased under decree.

518

Fourth. And it further appearing to the court from the record of proceedings in this cause that the "general mortgage" of the Wabash, St. Louis and Pacific Railway Company or other mortgages given by corporations parties to this suit to the Central Trust Company of New York and James Cheney, trustees, to secure said general mortgage bonds are the only mortgage liens on certain railroads and their appurtenances hereinafter described and which are now in the possession of said receivers or under the control of this court or the other courts exercising ancillary jurisdiction in this cause; and it further appearing from the record and proceedings in this cause that the title and interests of said Wabash, St. Louis and Pacific Railway Company in said railroads were offered for sale under the foreclosure decree herein, but that the same were not sold for want of bidders, to wit, the St. Louis, Jerseyville & Springfield railroad, extending from Bates to Grafton, in the State of Illinois; the Champaign & Southeastern railroad, extending from Champaign to Sidney, in the State of Illinois; the Attica, Covington & Southern railroad, extending from Attica to Covington, in the State of Indiana; the Des Moines & St. Louis railroad, extending from Albia to Des Moines, in the State of Iowa; and it further appearing to the court from the record and proceedings in said cause that there is also in the possession of said receivers a line of railroad known as the Des Moines Northwestern railroad, extending from Des Moines, Iowa, to Fonda, in said State, and that the only mortgage lien thereon is a mortgage executed on or about the 28th day of February, 1881, by the Des Moines Northwestern Railway Company to the Central Trust Company of New York and James Cheney, trustees, to secure such of said general mortgage bonds of the Wabash, St. Louis and Pacific Railway Company as might be actually issued for the construction of such railroad, but that no title or interest of said Wabash, St. Louis and Pacific Rail-

Mortgages given to secure general mortgage bonds first liens on certain lines.

Lines last mentioned not sold for want of bidders.

Mortgage given to secure general mortgage bonds a first lien on Des Moines Northwestern.

519

way Company in or to said railroad was sold or offered for sale under said foreclosure decree; and it further appearing to the court from the agreement under which said purchasing committee was formed, as said agreement is set forth in the report of Special Master Edmund T. Allen, filed herein on or about the 29th day of December, 1885, being the same agreement referred to in said foreclosure decree, that said purchasing committee are the representatives and agents of all the owners and holders of said general mortgage bonds—

Des Moines Northwestern not offered for sale under decree.

Purchasing com. are agents and representatives of the owners and holders of all the general mortgage bonds.

It is therefore further ordered, adjudged, and decreed that said committee on the day aforesaid take possession of all the aforesaid lines of railroad on which mortgages given to secure said general mortgage bonds are a first lien, to wit, the St. Louis, Jerseyville and Springfield railroad; the Champaign and Southeastern railroad; the Attica, Covington and Southern railroad; the Des Moines and St. Louis railroad, and the Des Moines Northwestern railroad, and said receivers are hereby ordered and directed to deliver to said purchasing committee on said day all the railroads last aforesaid and their appurtenances; but the delivery of said railroads and their appurtenances to said purchasing committee is made subject to the right hereby reserved to this court and to the other courts exercising ancillary jurisdiction in this cause to retake and, if necessary, to resell them, as is provided in said foreclosure decree with respect to retaking and reselling the railroads and property purchased thereunder in case said committee or their assigns shall fail or refuse to pay the debts and liabilities of said receivers or of said Wabash, St. Louis and Pacific Railway Company, which said courts or either of them have adjudged or may adjudge to be liens or charges upon said properties or any of them superior to the mortgages given to secure said general mortgage bonds.

Committee to take possession of all lines not purchased on which mortgages given to secure general mortgage bonds are first lien.

Lines last mentioned may be retaken and resold if receivers' debts are not paid.

520 Fifth. And it further appearing to the court from the record and proceedings in this cause that said receivers are now in possession of the Eel River railroad, extending from Logansport to Butler, in the State of Indiana, and that said railroad was held by said Wabash, St. Louis & Pacific Railway Company under a lease executed by the Eel River Railroad Company to the Wabash Railway Company on or about the 26th day of August, 1879; and it further appearing to the court that the leasehold interest of the Wabash,

Eel River railroad not sold.

St. Louis and Pacific Railway Company in said Eel River railroad was offered for sale under the foreclosure decree aforesaid, and that the same was not sold for want of bidders—

Eel River railroad to be tendered to purchasing com.

It is therefore further ordered, adjudged, and decreed that the possession of said Eel River railroad and its appurtenances be tendered to said purchasing committee on said first day of April, 1887, and that in case said committee declines to accept possession thereof, then that said receivers forthwith surrender the same to said Eel River Railroad Company.

Receivers to retain books and papers.

Sixth. For the purpose of enabling said receivers to make final settlement of their accounts and doings in the management of said property it is further ordered, adjudged, and decreed that until otherwise directed they retain in their custody all books of account, papers, and documents now in their possession which relate to the operation or management of the property in their charge or the earnings or expenses thereof or that pertain to the funds collected and disbursed by them or which relate to the business of said Wabash, St. Louis and Pacific Railway Company prior to said receivership, and which books, accounts, papers, and documents it may be necessary or convenient for them to have in order to adjust and settle their own accounts or accounts and claims against said company or its property which said receivers have been ordered or
521 may be hereafter ordered to pay by this court or any other court exercising ancillary jurisdiction in this cause, and said receivers will until their final settlement and discharge continue as heretofore to adjust their said accounts and the aforesaid accounts of said company, and they will from funds which may come into their possession under the provisions of this or any other order or decree pay said accounts and claims as they severally become due and payable.

Receivers to continue to adjust and pay their accounts.

All moneys in hands of receivers and all earnings of property prior to April 1, 1887, to be used in paying indebtedness.

It is further ordered, adjudged, and decreed that all the revenues of said property earned prior to said first day of April, 1887, be, as far as practicable, collected by said purchasers or their assigns and paid over to said receivers, and that all such funds, as well as all funds in the hands of said receivers or subject to their control on said first day of April, 1887, be used by said receivers in paying said indebtedness; and

Funds and certificates in registry of court to be delivered to receivers.

It is further ordered, adjudged, and decreed that all funds and receivers' certificates now in the

registry of this court be forthwith delivered to said receivers, and that said funds be also used by them for the purposes last aforesaid.

Unjust claims may be litigated by purchasers.

Seventh. It is further ordered, adjudged, and decreed that if any claim shall be made or presented against said receivers which they may deem unauthorized, illegal, or unjust they shall fort-with notify said purchasing committee or its assigns thereof, and thereupon said committee or its assigns may, without any further order or authority from this court, litigate and defend against such claims, but all the expenses of said litigation shall be paid by said committee or its assigns, and in case any claims shall be presented against said receivers with respect to the legality or justice of which they are in doubt they may pay the same with the approval of said committee or its assigns.

Doubtful claims may be paid by receivers with approval of purchasers.

Court reserves the right to make all further orders necessary to enforce decree.

Eighth. This court reserves unto itself the right to make all such other and further orders concerning the custody of the property taken possession of by said purchasing committee
522 under this order and with respect to the payment of such other and further sums of money by said committee or its assigns as may be deemed necessary to carry into effect the provisions of said foreclosure decree, and said receivers may from time to time apply to this court for such other and further orders and instructions as they may deem necessary.

Receivers may apply for further orders.

Nothing in this order contained or in bond of committee to be construed as affecting former decrees and orders.

Ninth. Nothing in this order contained is intended to modify or shall be construed as modifying or revoking anything contained in the decree of foreclosure entered herein on or about January 6th, 1886, or as modifying or revoking anything contained in the order entered herein on or about the 15th day of June, 1886, confirming the sale to said purchasing committee of portions of the property described in said foreclosure decree, but the provisions of this order and of the bond herein mentioned and required of said purchasing committee are intended to be in addition to the several matters and things contained in the decrees and orders aforesaid.

Mercantile Trust Company to deliver to committee property in its possession.

Tenth. On presentation of a copy of this order to the Mercantile Trust Company of New York, with an indorsement thereon under the hand of the clerk and the seal of this court to the effect that the bond of said purchasing committee as herein required has been filed and approved, said Mercantile Trust Company of New York shall

deliver to said purchasing committee all the property purchased by them under said foreclosure decree now in possession of said trust company.

Receivers to give notice that claims not presented within four months will be barred.

Eleventh. For the purpose of enabling said receivers to make final settlement of their accounts at an early day it is further ordered, adjudged, and decreed that they cause to be printed for thirty days in at least one newspaper published in some town or city on the line of the railroad in each of the States in which the railroads
523 taken possession of by them as receivers are situated a notice, addressed to all persons having claims against them as receivers or against said Wabash, St. Louis and Pacific Railway Company of a class which they as receivers have been ordered to pay, setting forth that all such claims not presented to and approved by said receivers or presented to this court for adjudication or allowance within four months after the first publication of said notices will be forever barred as claims against them and the funds of said receivership, and that such parties will thenceforth stand remitted to such rights as they may have against the property described in said foreclosure decree.

(Signed) DAVID J. BREWER,
Circuit Judge.

524 In pursuance of the last-mentioned order the purchasers entered into possession of said property and filed their bond in the sum of $750,000, and have since paid the full amount of said bond according to its terms, and said purchasing committee at the date of this appeal hold the title acquired under and by virtue of the orders, decrees, sales, and deeds heretofore recited and set out.

525 UNITED STATES OF AMERICA, }
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern division of the eastern judicial district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record, pleadings, and proceedings *In re* St. Joseph & St. Louis Railroad Company, intervenor, in case- Nos. 2357 & 2464 (consolidated) of Central Trust Company of New York and James Cheney, complainants, against Wabash, St. Louis & Pacific Railway Company and others, defendants, as fully as the same remain on file and of record in said case in my office.

Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in the eastern division of said district, this first day of November, in the year of our Lord eighteen hundred and eighty-eight.

A. P. SELBY,
Clerk of said Court,
By —— ——, *Deputy.*

526 [Endorsed :] Nos. 2357 & 2464 (consolidated). United States circuit court, eastern division of the eastern judicial district of Missouri. *In re* St. Joseph & St. Louis Railroad Company, intervenor in case of Central Trust Company of New York and James Cheney against Wabash, St. Louis & Pacific Railway Company and others. Duly certified transcript of the record, pleadings, and proceedings in the above-entitled cause.

Endorsed on cover: E. Missouri C. C. U. S. No. 701. The St. Joseph & St. Louis Railroad Company, appellant, *vs.* Solon Humphreys and Thomas E. Tutt, receivers of the Wabash, St. Louis and Pacific Railway Company *et al.* Filed November 2nd, 1888.

IN THE SUPREME COURT OF THE UNITED STATES.

THE ST. JOSEPH & ST. LOUIS RAILROAD COMPANY, Appellant,
vs.
SOLON HUMPHREYS & THOMAS E. TUTT, Receivers, *et al.*

To Wells H. Blodgett, counsel for appellees in the above-entitled cause:

You are hereby notified that under and in accordance with the stipulation entered into by and between counsel in the above appeal I am about to file in the office of the clerk of the Supreme Court of the United States an additional portion of the record in the said consolidated cause. A copy of the papers which I am about to file as above is hereto attached.

EVERETT W. PATTISON,
Attorney for Appellant.

Service of the above notice and of a copy of the papers annexed is hereby acknowledged, and I consent to filing same.
St. Louis, February 8th, 1892.

WELLS H. BLODGETT,
Counsel for Solon Humphreys & Thomas E. Tutt, Receivers; The Central Trust Co. of New York and James Cheney, Trustees, and for The Wabash, St. Louis and Pacific Railway Company.

In the Supreme Court of the United States.

THE ST. JOSEPH & ST. LOUIS RAILROAD COMPANY, Appellant,
vs.
SOLON HUMPHREYS & THOMAS E. TUTT, Receivers, *et als.*

Now, this day, comes the said appellant and files the certified copy hereto attached of a part of the record in the consolidated cause of The Central Trust Company of New York *et al. vs.* Wabash, St. Louis & Pacific Railway Company *et al.* under and by virtue of the stipulation which is attached to and made a part of the record in this case, filed on the second day of November, 1888, said stipulation being as follows, to wit:

Stipulation as to Record.

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

THE CENTRAL TRUST COMPANY OF NEW YORK and JAMES CHENEY, Complainants, *vs.* WABASH, ST. LOUIS AND PACIFIC RAILWAY Company and Others, Respondents; The St. Joseph and St. Louis Railway Company, Intervenor.	Consolidated Cause. Nos. 2357 and 2464. In Equity.

In the matter of the intervening petition and supplemental intervening petitions of the St. Joseph and St. Louis Railroad Company, praying for an order on the receivers to pay the sum due said petitioner as rentals under the lease from said petitioner to the St. Louis, Kansas City and Northern Railroad Company, being Sub-Exhibit F No. 18, filed by the original complainant The Wabash, St. Louis and Pacific Railway Company, as an exhibit to its amended bill of complainant herein.

Now come the St. Joseph and St. Louis Railroad Company and the Wabash, St. Louis and Pacific Railway Company, the Central Trust Company of New York and James Cheney, trustees, and James F. Joy, O. D. Ashley, Thomas H. Hubbard, and Edgar T. Welles, trustees, and sometimes styled "purchasing committee," and, for the purpose of simplifying the record in the above-entitled matter and saving the copying in full of the record in the above-consolidated cause, stipulate and agree that the following abstracts and recitals of the record and proceedings in said consolidated cause are true and correct statements of said record and proceedings so far as the same pertain thereto and may be taken and accepted by the Supreme Court of the United States in the hearing of the appeal from the final decree in said intervention as of the same force and effect as if said records and proceedings were fully and at length embraced in the transcript of appeal herein; but these admissions are without prejudice to either party in any other proceedings or on any other occasion and are for the purposes of this suit only, and either party to this proceeding may, for the purposes of such appeal, bring up and insert in and as part of such abstracts and recitals any other part of the record in the said consolidated cause that he may deem material.

PATTISON & CRANE,
Attorneys for St. Joseph & St. Louis R. R. Co.
WELLS H. BLODGETT,
Solicitor for Solon Humphreys & Thomas E. Tutt, Receivers; The Central Trust Co. of New York and James Cheney, Trustees, and for The Wabash, St. Louis and Pacific R'y Co.

And appellant prays that the said additional record herewith filed may be, in accordance with said stipulation, considered a part of the record upon this appeal as fully and to all intents and purposes as if the same had been embodied in the record originally sent up from the court below.

EVERETT W. PATTISON,
Attorney for Appellant.

GEORGE R. PECK,
BRITTON & GRAY,
Of Counsel.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

In the Circuit Court of the United States in and for said Division of said Judicial District.

Be it remembered that on the thirty-first day of May, A. D. 1884, the following, among other, proceedings were had and appear of record in the circuit court of the United States for the eastern district of Missouri, to wit:

WABASH, ST. LOUIS & PACIFIC R'Y CO., Complainant,
vs.
CENTRAL TRUST CO. OF N. Y. *et al.*, Defendants. } 2357.

Now comes the St. Louis, Iron Mountain & Southern Railway Company, by John C. Brown and Thomas J. Portis, its solicitors, and enters its appearance to the bill of complaint herein and consents to the order heretofore made appointing Solon Humphreys and Thomas E. Tutt receivers.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern division of the eastern judicial district of Missouri, do hereby certify the writing hereto attached to be a true copy of record entry of May 31st, 1884, in case No. 2357, of Wabash, St. Louis & Pacific Railway Company, complainant, against Central Trust Co. of New York *et al.*, defendants, as fully as the same remains of record in said case in my office.

Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in the eastern division of said district, this second day of February, in the year of our Lord eighteen hundred and ninety-two.

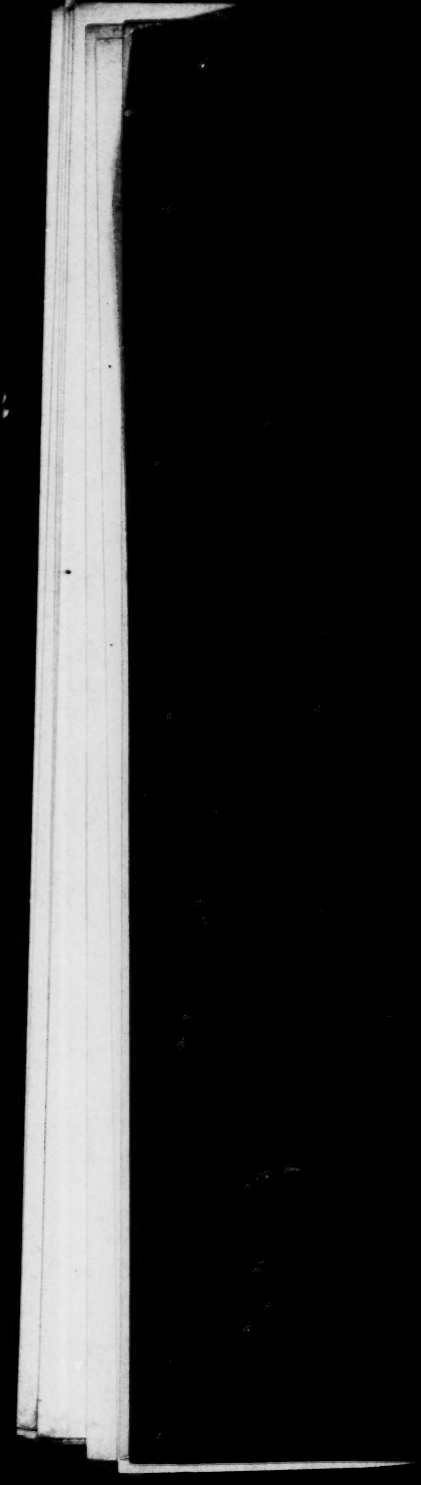
A. P. SELBY,
Clerk of said Court,
By GEO. F. HAID, *Deputy.*

[Endorsed:] No. 2357. United States circuit court, eastern division of the eastern judicial district of Missouri. Wabash, St. Louis & Pacific R'y Co. against Central Trust Co. of N. Y. *et al.* Duly certified copy of record entry of May 31st, 1884, in the above-entitled cause. Fee, 65 cts., paid by E. W. Pattison, Esq.

[Endorsed:] Supreme Court of the United States. St. Joseph & St. Louis R. R. Co. *vs.* Solon Humphreys & Thos. E. Tutt, receivers, *et al.* Appellant's addition to the record, brought up under the stipulation on file. Supplemental record. Everett W. Pattison, attorney & counselor. Offices: Odd Fellows' building, St. Louis, Mo.

[Endorsed:] Case No. 13,423. Supreme Court U. S., October term, 1891. Term No., 287. The St. Joseph & St. Louis R. R. Co. *vs.* Humphreys & Tutt, receivers, &c. Notice, consent, & addition to record.

[Stamped:] Office Supreme Court U. S. Filed Feb. 13, 1892. James H. McKenney, clerk.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

ST. JOSEPH AND ST. LOUIS RAILROAD COMPANY, APPELLANT,
vs.
SOLON HUMPHREYS AND THOMAS E. TUTT, RECEIVERS OF THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY.
No. 287.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

APPELLANT'S STATEMENT AND ASSIGNMENT OF ERRORS.

I. *The lease of appellant's railroad.*

By a lease dated June 1st, 1874, appellant demised its railroad and other property, which was entirely free from encumbrance of every kind, to the St. Louis, Kansas City & Northern Railway Company for a term of ninety-nine years. Both lessor and lessee were railroad corporations

of the state of Missouri, and citizens of that state. The rental after the first five years of the lease was to be 30 per cent. of the gross earnings of the demised road, the lessee guaranteeing that this percentage should in no year be less than $25,000. (Record, pp. 13 et seq.)* As a matter of fact the rental averaged about $45,000 a year. (Record, p. 9.) At the time the lease was entered into the lessor had no rolling stock of its own. (Record, p. 37.)

The rent was to be paid in semi-annual installments on the first days of March and September, and was to be computed upon an account of the gross earnings rendered to the first day of the preceding month. It was agreed that the demised road should always earn an equal amount per mile with the railroad of the lessee upon all joint business. (Record, p. 14.)

It was also provided that the lessee should put the road-bed, culverts, bridges, station houses and all the demised property in such order and repair, at its own cost and charges, as to enable the road to be safely and successfully operated at the earliest practicable day, and to operate the same, keeping it in such order and condition during the term of the lease. (Record, p. 15).

It was further provided, that the lessee should have the exclusive control and management of the operations and business of the road, and should regulate and determine the rates of passage money, tolls, freight and charges thereon, and the manner of operation. (Record, p. 16.)

The St. Louis, Kansas City & Northern Railway Company immediately took possession of appellant's road, and operated it until August, 1879, at which time the lessee

* The references are to the pages of the printed record, unless otherwise specified. Under the stipulation which will be found on the first page of the printed record, appellant has brought up an additional entry, duly certified, which will be referred to as the Supplemental Record.

was consolidated with a corporation of Illinois and other States, the consolidated road taking the name of the Wabash, St. Louis and Pacific Railway Company, which, for convenience, we shall hereafter designate as the "Wabash Company." That part of the consolidated company which was located in Missouri, constituted a corporation of that State. (Const. Art. XII, § 18; Record, p. 224.) At the time of this consolidation, each of the parties to it owned certain lines of road, and also operated under leases various additional lines. Subsequently to the consolidation, the Wabash Company acquired other lines of road, some located in Missouri, others in Illinois and in the various States covered by the Wabash system. The lease of appellant's road was the oldest in date of all (Record, p. 129), and appellant's road is the only one in the system that was not under mortgage at the time of its becoming incorporated into the system. The general mortgage hereinafter mentioned, which was a blanket mortgage given by the Wabash Company, covering its entire property, was the first encumbrance of any kind which was placed on appellant's property.

After the consolidation, the Wabash Company held and operated appellant's road under the lease. The rental was duly paid each half year until March 1st, 1884. It was, however, found impracticable to comply with the terms of the lease in the matter of rendering accounts of gross earnings to the first of the month preceding the days fixed for payment. The amount of labor involved in keeping these accounts was so great that the actual returns were two and, sometimes, three months behind. But in order to make the payments on the day specified, the earnings for the last two or three months, as the case might be, were estimated. When the accounts were finally made up, if it appeared that this estimate had been too high, a proportional amount was deducted from the next payment of rent. If it was

found that the estimate had been too low, a proportional amount was added to the next payment.

When the payment of March 1st, 1884, was made, the account of the gross earnings for the months of December, 1883, and January and February, 1884, had not been made up; but they were estimated at $33,000. When the correct calculation was made, it was found that the actual gross earnings were $43,321.72. (Record, p. 166.) Thirty per cent of the difference is $3,096.52. (Record, p. 38.) Therefore, appellant received on March 1st, 1884, $3,096.52 less than the full amount to which it was entitled for the half year ending March 1st, 1884, which sum, under the terms of the lease and the course of dealing between the parties, became a part of the rent due for the half year ending September 1st, 1884.

II. *The Wabash Company asks the appointment of receivers.*

On May 27th, 1884, the Wabash Company filed a bill in equity in the Circuit Court for the Eastern District of Missouri (Record, p. 244), declaring itself to be insolvent, and alleging that its property was subject to certain mortgages. Two of these mortgages covered the entire Wabash system, and these two were the only ones which affected appellant's road. The first of these in point of time was called the General Mortgage, and the trustees therein were the Central Trust Company of New York and James Cheney. For the sake of brevity, we shall hereafter use the term "The Central Trust Company," as representing both of these trustees. The other was an indemnity mortgage to the St. Louis, Iron Mountain and Southern Railway Company (which we shall hereafter call the "Iron Mountain Company"), and was given for the purpose of indemnifying that company for certain advances

made, or to be made by it, to the Wabash Company. (Record, pp. 225, 227). This indemnity mortgage was subsequent in point of time and subject to the general mortgage.

In its bill of complaint the Wabash Company declared itself to be a corporation organized under the laws of the State of Missouri and a citizen of Missouri. (Record, p. 224.) It named as defendants the trustees in the general mortgage, the Iron Mountain Company, and a large number of other railroad corporations and individuals, including appellant, which was, and always has been, a corporation of Missouri and a citizen of the Western District thereof.

The prayer of the bill was that one or more receivers be appointed to take possession of the entire property, and to preserve, operate, manage and control the same, and that a sale of the property be decreed. (Record, p. 232.)

No service was had upon appellant until long after the appointment of the receivers, and appellant had no notice whatever of the filling of the bill nor of the intention of the Wabash Company to apply for receivers nor of their actual appointment, nor of their taking possession of appellant's road, until after all these were accomplished facts. It appears, however, from the allegations of the bill, that notice and a copy of the bill were served on the trustees in the general mortgage before the bill was filed. (Record, p. 236.) These allegations are not denied. Furthermore, in their cross-bill the trustees allege that they had intended and proposed to file a bill for the foreclosure of the mortgage, and for the appointment of receivers, and would have done so had they not been anticipated by the Wabash Company. (Record, p. 241.)

III. *Receivers are appointed and take possession of appellant's road and property.*

On the same day on which the bill was filed, the Circuit Court made an order appointing Solon Humpreys and Thomas E. Tutt receivers of all the property of the Wabash Company, "with power and instructions to take possession of the same and to manage, control and operate said railroad" (Record, p. 239); and all parties were required to surrender to these receivers all the lines of said railroad. (Record, p. 240.) It was further ordered that the receivers, "out of the income that should come into their hands from the operation of said railroad, *or otherwise*" should "pay all rentals accrued, or which may hereafter accrue, upon all leased lines of said complainant." (Record, pp. 239, 246.)

On May 29th, 1884, the receivers took possession of the property, including the road of appellant. On May 31st, 1884, the Iron Mountain Company appeared, and entered its formal consent to the order whereby Messrs. Humphreys and Tutt were appointed receivers. (Supplemental Record.)

On June 9, 1884, being only eleven days after the appointment of the receivers, the trustees in the general mortgage appeared, and filed their cross-bill, in which they prayed for the foreclosure of their mortgage and for the sale of the property, mentioning specifically appellant's road and others. This cross-bill contained a prayer for the appointment of receivers, "with the usual powers of receivers in like cases, of all and singular the mortgaged property and premises, and that such receivers be authorized and directed to maintain and operate said railroads, and to keep the same in proper repair." (Record, pp. 241-242.)

That part of the prayer asking the appointment of receivers under the cross-bill was refused by the court, on the ground that it had been already substantially granted;

that all the trustees desired was that some one should preserve the property for the benefit of the mortgagees, which involved no question except a technical or formal one, and the court might appoint for that purpose the same men who already occupied the position. (Record, p. 242,243.)

The trustees afterward filed an amended cross-bill in the Federal Court, and, at a still later date an original bill in one of the State Courts of Missouri, which latter cause was immediately thereafter removed by the complainants to the Federal Court for the Eastern District of Missouri, where it was consolidated with the suit originally brought by the Wabash Company. This original bill filed in the State Court was substantially like the cross-bills previously filed, and like them contained a prayer for the foreclosure of the mortgage, and the appointment of receivers.

The receivers retained possession of, and continued to operate appellant's road until April 24, 1886, at which time they surrendered it to appellant by order of the Circuit Court, appellant having applied for a cancellation of the lease upon the ground of non-compliance with the covenants thereof. (Record. p. 199.) At a previous date, however, the receivers had sought to cancel the lease. (Record, pp. 261–267.) The court declined to take such action, though it did direct the receivers to reduce the extent of its operation. (Record, p. 271.) As the notice of the hearing in this matter, which the receivers gave to appellant, contains a clear recognition that the receivers had adopted our lease, we give that part of it entire.

"You are further notified that on Monday, the 13th day of April, 1885, or as soon thereafter as we can be heard, we will apply to said court for instructions concerning a cancellation of the lease entered into on or about the st day of June, 1874, between the St. Joseph and the St. Louis Railroad Company, of the first part, and the St. Louis, Kansas City and Northern Railway Company, of the second part, *and a surrender by us of said leased property*

to whomsoever the court may direct, and for such other and further orders with respect thereto as the facts may require in justice to all the parties concerned." (Record, p. 267.)

IV. *When the receivers took possession they were aware of the condition of appellant's road.*

In view of the plea set up by the receivers, after the lapse of some months, as an excuse for not paying rent to appellant under the lease, it becomes important to consider what knowledge they possessed and what sources of information they had as to the condition of appellant's road and its value as a part of the Wabash system.

The evidence shows that both receivers were thoroughly familiar with its condition and value, and had, for many years prior to their appointment as receivers, been fully apprised of all the facts appertaining to its operation. Moreover, their first act was to appoint James F. How as their executive officer, under the title of General Agent, which position he occupied so long as the receivers were themselves in office. (Record p. 114.) Mr. How had been the Secretary of the St. Louis, Kansas City & Northern Railway Company, the original lessee, and signed the lease as such. (Record, pp. 18, 119, 120.) He remained secretary of the original lessee until its consolidation with the Wabash, and was from that time connected with the Wabash Company as secretary, and part of the time as vice-president also. These offices he held until the receivers were appointed. (Record, pp, 119-120.) His official connection with the Wabash and its predecessors covered a period of fifteen years and a half. (Record, p. 114.) Mr. How's position was such, therefore, that he must have been familiar with the condition and operation of appellant's road.

The same is true of the receivers themselves. At the

time the lease was executed Mr. Humphreys was a member of the board of directors of the original lessee. After the consolidation, he was continually in the board of the Wabash Company, and much of the time its president, until he was appointed receiver. Mr. Tutt, the other receiver, was a director of the Wabash Company, and served in that capacity up to the time of his appointment as receiver. (Record, pp. 120, 88.)

The natural inference from these facts is, that these gentlemen had full knowledge of the condition of the property. But we are not left to inference. That they were, in fact, fully informed of its condition abundantly appears from the evidence. Mr. Gouldy, who was for many years secretary of appellant, testifies that at least as often as once in two years he went over the road to inspect it. On each of these occasions he remonstrated with some general officer of the lessee as to the condition in which it was maintained. The person with whom he generally had these conversations was Mr. How, the secretary. In 1882 he saw both the vice-president and Mr. How, and both told him that they "intended to put the road in good condition right off." Mr. Gouldy further states that the first proposition ever made for leasing appellant's road was made by Mr. Humphreys, and that this was as early as the winter of 1873–4; that in 1881 Mr. Humphreys told him that he knew all about the road and had been familiar with it from its origin. About that time Mr. Gouldy had a conversation with Mr. How, in which the former suggested that he might arrange to relieve the Wabash system of the lease, but Mr. How refused to accede to any such proposition. (Record, p. 164.) It is true, Mr. How testifies that he never heard of any proposition to surrender the lease. (Record, p. 122.) That may be literally true, since Mr. Gouldy does not claim that his suggestion was in any sense a formal or official proposition. But Mr. How does not

deny that he had the conversation with Mr. Gouldy, which the latter testifies to.

It further appears from the testimony of Mr. Gouldy that while he was secretary of appellant's road frequent complaints were made to him by shippers of the lack of facilities furnished to them on our line, and that he reported such complaints to Mr. How (Record, p. 164). No attempt was made to deny any of these statements of Mr. Gouldy as to the information imparted to the gentlemen who afterwards became the receivers and the general agent of the receivers.

That Mr. Humphreys had full personal knowledge of the condition of appellant's road further appears from conversations which he had with citizens of St. Joseph while he was a director of the Wabash Company. About 1880 or 1881 he told Mr. Chew, a merchant of St. Joseph, that in three or four months from that time the intervenor's road would be improved. He said "they were going to put it immediately in the best condition and lay it with steel rails and give it the best passenger accommodations the Wabash was able to afford." (Record, pp. 60-61.) This promise was not made good.

Mr. Burns, another citizen of St. Joseph, had a conversation with Mr. Humphreys when the latter was president of the Wabash, in which he urged Mr. Humphreys to put that part of the road in first class condition. (Record, p. 88.)

It further appears that the original lessee was acquainted with the condition and operation of the road even prior to the execution of the lease, since it had been operated by the old North Missouri Company, to which the lessee succeeded, and whose managing officers were the same as those of the lessee. (Record, p. 131.)

We are particular in calling attention to these facts, for

the reason that the receivers, at a much later date, asserted their ignorance of the condition of our road, and alleged that they had discovered that its possession was of no advantage to the system which had been placed in their hands. And it was on this ground that the Master recommended the rejection of appellant's claim for rent. It is evident, too, that this consideration had great weight with the court below.

We quote a passage from the Master's report, which confirms what we have stated above as to the receivers' knowledge, and shows that if our road was in fact a non-paying one, these gentlemen were, as officers of the lessee, in part responsible for it. The Master says: —

"I find from the evidence that the Wabash Company had, prior to the date the receivers took possession thereof, failed and neglected to keep intervenor's road in repair in accordance with the terms of the lease; that the outlays made by the receivers were extraordinary and were caused in part by the failure of the railroad company, lessee, to keep intervenor's road in repair in accordance with the covenants of the lease. But I further find from the evidence in this connection that extraordinary outlays upon said road for many months, perhaps years to come, will still be required from the same cause; that a part of the expenses incurred by the receivers were for repairs and betterments, and that the necessity for such repairs and betterments arose from the failure of the original lessee and successor to put and keep the road of intervenor in the condition in which it was to be kept by the covenants of the lease, and that there still exists from the same cause a neecssity for still further repairs and betterments; I find from the evidence that the gross earnings of intervenor's road have been decreased and diminished by reason of the failure of the lessee to keep and carry out the covenants of the lease. But the evidence does not satisfy me that compliance with the terms of the lease by the lessee and its successor or the receivers would at any time since the date of the lease, have resulted in any profit from the operation of the road. (Record, p. 42).

V. *The receivers took possession of and operated appellant's road without objection, and held themselves out as having assumed the lease.*

With this full knowledge of the condition and state of repair of appellant's road, and of its earning capacity, the receivers took possession of it and operated it without a word of objection, without any intimation to the court, the trustees, mortgagees or appellant itself that they considered the road unprofitable, or that its operation was disadvantageous to the system, or to the creditors, secured or unsecured. So far from intimating any desire to give up the road, or that any necessity for such course existed, they made known to the court below, on June 26th, that its operation was proper and advantageous. On that date they filed a report wherein they stated that they had made thorough investigation of the condition, earning capacity, etc., of the system, as a whole and in its various parts. The facts to which I have already adverted, that both the receivers had been up to the time of their appointment officers of the Wabash Company, and that their executive officer had been one of the executive officers of that company, necessarily enabled them to make this investigation much more expeditiously and satisfactorily than had they been strangers to the system.

This report will be found on pages 246–255 of the record. After giving in detail the classes and amounts of coupons which had already matured, or which were about to mature, on the various underlying mortgages of the Wabash system, the receivers make this important statement:—

"Your petitioners further state that they are advised and believe, that each and all of the aforesaid lines of railroad which were owned or controlled either by the Wabash Railway Company or by the St. Louis, Kansas City & Northern Railway Company, before their consolidation in 1879, * * * have at all times during the five years last passed, or ever since their construction, earned more than enough to

pay all their operating expenses, the cost of maintenance and interest upon the several series of bonds above described and respectively secured upon them by the mortgages or deeds of trust aforesaid. (Record, p. 251.)

The significance of this admission consists in the fact that appellant's road had been for ten years prior to the receivership a part of the St. Louis, Kansas City & Northern Railway Company; and in this report there is not only no intimation that it had been a burden to its lessee, but there is a distinct statement that the latter had, as a whole, earned more than enough to pay its operating expenses, cost of maintenance and interest upon its bonds.

But there were certain other lines, ten in number, all of which were acquired by the Wabash Company subsequently to the consolidation, some located in Missouri, some in Illinois, and some in Iowa, which had not paid their operating expenses, cost of maintenance and interest on their bonds. As to these they say: —

"Your petitioners further state that they are informed and believe that the earnings of none of the lines or divisions last above described have at any time since their acquisition been sufficient to pay their operating expenses, the cost of their maintenance and interest on the several series of bonds and other obligations above described.' (Record, pp. 253–254.)

This report demonstrates that the receivers, from their previous knowledge and from investigations made subsequent to their appointment, were enabled to say with reference to the ten lines last referred to, that they had failed to pay their operating expenses and fixed charges. From the fact that appellant's road was not included in the list, it is apparent either that our road was operated at a profit,* or if it were not, that the receivers considered it of too much importance to the system to be surrendered. And, in this connection, it is important to note the paragraph

* See post, pages 21, 22.

of the report which follows that last quoted, and which reads as follows:—

"Your petitioners further state that from the incoming rents and profits of the property now in their possession under a former order of this Honorable Court, they believe they can, until otherwise directed, *pay all the expenses of operating the same*, the cost of maintenance, and all interest from time to time maturing, and all bonds and other obligations secured by mortgage or deeds of trust on the several lines or divisions thereof that were owned or possessed either by the Wabash Railway Company *or by the St. Louis, Kansas City & Northern Railway Company* before their consolidation." (Record, p. 254.)

Thus the receivers solemnly declared that not only was appellant's road not a burden to the system, but that they were able to pay its rental.

In concluding their report the receivers asked the instruction of the court as to what should be done with the ten roads mentioned. The entire report was referred to the Master, and he expressly found that the statements made by the receivers, that the lines of railroad which composed the St. Louis, Kansas City & Northern Railway Company at the time of the consolidation, had ever since the consolidation earned more than enough to pay all their operating expenses and fixed charges. (Record, p. 256.) As to the other lines, he recommended that the receivers be required to keep separate accounts of the earnings and expenses and make quarterly reports thereof to the court. (Record, p. 260.) It was not deemed necessary to require the receivers to keep separate accounts as to appellant's road, and no order to that effect was ever made.

The recommendations of the Master were confirmed by the court, and by virtue of the following paragraph the receivers were again ordered to pay appellant's rental:—

"It is ordered that until otherwise directed the receivers herein, from the incoming rents and profits of said property, *after meeting such other obligations as*

they have been directed to discharge by the former orders of this court, pay from whatever balance may remain in their hands, the interest upon the following bonds, etc." (Record, p. 257.)

As the rental of the appellant's line was one of the things which the receivers had been by the former order of the court directed to pay (see Record, p. 239, side page 363), this was a distinct confirmation of the order, and an express instruction to pay our rental in preference to the interest on the bonds.

The foregoing proceedings demonstrate the fact that the receivers entertained no doubt as to the propriety of their action in assuming appellant's lease. We will now show that the lessee, the trustees in the general mortgage, and the Iron Mountain Company, which latter was the mortgagee in the indemnity mortgage, were equally well satisfied with the course of the receivers in this respect, and that the operation of appellant's road was undertaken and continued with the full and unqualified consent of each.

VI. *This operation of appellant's road by the receivers was with the full knowledge and consent of the lessee and the mortgagees.*

The lessee and both mortgagees not only permitted the receivers to operate appellant's road without dissent, but the record shows an express assent on the part of each of them. The lessee incorporated in the prayer of its bill a request that the rentals be paid. (Record p. 233.) The order of the Circuit Court appointing the receivers, expressly directed them to pay the rentals accrued and to accrue. (Record, pp. 239-40.) The Iron Mountain Company within two days thereafter appeared in court and consented to the order. (Supplemental Record.)

The trustees in the general mortgage made their assent

equally explicit. A copy of the bill, with notice of the application about to be made for the appointment of receivers, was served on them before the bill was filed. (Record, p. 236.) To this they made no opposition. Subsequently on four several occasions they manifested an express assent to the appointment of receivers, viz: in their cross-bill, filed June 9th, 1884 (Record p. 242); in their amended cross-bill, filed October 14th (Record, p. 260); in their original bill, filed in the State court January 13th, 1885, and immediately removed to the Federal court and consolidated with the suit which had been brought in the name of the Wabash Company (Record p. 260); and, finally, in their answer to appellant's intervening petition. (Record, p. 31.)

In the two cross-bills, and in the original bill filed by the trustees, they pray that the entire property of the Wabash Company be placed in charge of the receivers, and that the receivers be directed to operate all the railroads of the system. If these trustees were dissatisfied with the assumption of appellant's lease by the receivers, here were three several opportunities for them to make known their dissatisfaction. But the record will be searched in vain from end to end for one word of objection on their part to the order of the court or the action of the receivers thereon. They never suggested that the order should even be modified. On no occasion did they intimate that the payment of rent to the leased lines would be unjust to the interests represented by them.

On the other hand, appellant had no right to object to the appointment of the receivers, nor did it have any opportunity to do so, inasmuch as the order was made and its road was in the hands of the receivers before it had any information of the intended move.

VII. *The trustees in the General Mortgage solemnly admit tha the receivers adopted appellant's lease.*

But the most significant of the four pleadings just mentioned is the last, viz.: the answer of the trustees of the general mortgage to our intervening petition. That answer was filed on February 7, 1885. In it they admit the execution of the lease, and that its terms are correctly set out in the intervening petition of appellant. They admit that the Wabash Company became by consolidation the lessee. They admit the execution of the general mortgage and that it embraced appellant's leasehold. They admit that they were made parties to the bill filed by the Wabash Company, and that they filed two cross-bills wherein they prayed that the mortgage might be foreclosed. (Record, p. 31, 321.) And lastly, and most important of all, they admit that on May 29th, 1884, the receivers "took possession of the property demised in said lease, as alleged, and that they have since that time held, used and operated said road in and by said lease demised, *and under and by virtue thereof*, and that they are now using and operating said road." (Record, p. 33).

VIII. *Appellant files an intervening petition, asking for the payment of its rental.*

On September 1st, 1884, the first installment of rent accruing after the appointment of the receivers, fell due. In the following November appellant filled an intervening petition, asking that the receivers be ordered to pay this rent, which petition it afterwards amended. The amended intervening petition will be found on pages 2 *et seq.* of the record.

This petition sets out the execution and terms of the lease to the St. Louis, Kansas City and Northern Railway Company, the consolidation with the Wabash, the appoint-

ment of the receivers, and alleges that they took possession of the road on May 29, 1884, and adopted the lease. This allegation is in the following words: —

"On said day the receivers took possession of the road, property, rights, franchises, etc., of your petitioner, which had been demised as aforesaid * * * And said receivers have ever since said 29th day of May, 1884, held, used and operated your petitioner's said road and other property in and by said lease demised, and under and by virtue of said lease and the powers therein contained, and said receivers are now using and operating said road and have recognized and adopted said lease and have elected to enter thereunder upon the premises therein demised and to avail themselves of the powers, privileges and rights therein conferred upon said lessee." (Record, p. 10.)

To this petition the receivers and both mortgagees were made parties. The receivers and the Central Trust Company filed separate answers. The Iron Mountain Company demurred; its demurrer was overruled and it did not answer over. (Record, p. 30, 35.) The Wabash Company also appeared. (Record, p. 163.)

After the filing of its intervening petition, during the course of the hearing, and before the final report was made, the rent for several additional half years accrued. By leave of the court, and under stipulations between the parties, supplemental intervening petitions were filed by appellant, covering the various amounts, and the Master found that the following sums accrued as rental on the respective dates following, to-wit: —

On Sept. 1st, 1884, * * * $27,420.79 (Record, p. 36.)
On Mar. 1st, 1885, * * * 28,572.37 (Record, p. 45.)
On Sept. 1st, 1885, * * * 25,899.85 (Record, p. 207.)
On Mar. 1st. 1886, * * * 31,310.52 (Record, p. 207.)

For the fraction of the half year ending April 24th, 1886, on which day the road was surrendered to appellant, the rental was $8,224.15. (Record, p. 207.)

The lease provided that in case of default in the pay-

ment of rent, the lessee should pay as a penalty one-tenth of one per cent. on the amount due for each day during such period of default until the rent should be paid, or the lease forfeited (Record, p. 16), and the intervening petition contained a prayer for the payment of this penalty also.

IX. *Receivers allege that appellant's road was being operated at a loss.*

The first answer filed by the receivers was a general denial. On February 11th, 1885, they filed an amended answer in which they admitted the truth of all the averments of the intervening petition except those especially denied. The only denial necessary to note in this connection is the third, which is in the following language:—

"They deny that they ever since the 29th day of May, 1884, or at any time since, have held, used or operated the intervenor's said road under and by virtue of said lease, or the powers therein contained, or that they have recognized or adopted said lease, or elected to enter thereunder upon said demised property." (Record, p. 27.)

It will be observed that this denial is diametrically opposed to the admission on this point contained in the answer of the trustees. (Record, p. 33.)

The receivers' answer also contained the following averment:—

"That pursuant to a general order of this court, in that behalf duly entered in the principal cause, they as receivers, did on May 29th, 1884, take possession, control and management of the intervenor's said railroad without inquiry or knowledge by what right, contract or lease the complainant herein (the Wabash Company) had acquired the possession and management of the said road of intervenor." (Record, p. 28.)

As has been already shown, the evidence not only failed

to support this averment of want of knowledge, but established the converse.

The receivers then allege that the operating expenses of appellant's road, exclusive of rents, was in excess of gross earnings, and assert that it would be unjust and inequitable to require them to take the earnings and profits of other branches of the system and appropriate the same in the payment and discharge of intervenor's rents. (Record, p. 28.)

The following is the concluding paragraph of this answer: —

"These respondents therefore pray the advice of this Honorable Court whether they shall longer continue in the operation and possession of said road, or as to whether they shall hereafter adopt or ratify said lease, made on the ——day of———, 188—, between said intervenor and the St. Louis, Kansas City and Northern Railway Company, or whether they shall deliver the same over to the intervenor herein, or, in the event the intervenor shall refuse to receive it, they shall abandon the said road, and for such other orders and directions in the premises as to your Honors may seem equitable and proper." (Record, p. 28.)

It thus appears that on February 11th, 1885, or nearly nine months after the receivers had taken possession, they asserted for the first time the belief that appellant's road did not pay its operating expenses, and set this up as furnishing a sufficient reason why our intervening petition should be overruled. It may be remarked that the evidence shows that what the receivers alleged as to the line of appellant was in great measure true of all the lines comprising the Wabash system, both before it went into the hands of the receivers and afterwards. The bill filed by the Wabash Company contains an express admission of insolvency. (Record, p. 230.) In March, 1885, the receivers informed the court that the main lines were earning little, if any thing, in excess of the operating expenses. (Record, p. 262.) It appears further from the various reports con-

tained in this record, that there were but few of the lines that were earning anything in excess of operating expenses and interest, and many, if not most of them, were not doing that. (Record, pp. 270, 271.) The fact that it was found necessary to issue Receiver's Certificates to a large amount, is, of itself, conclusive evidence that the system was run at a loss after it came into the hands of the receivers. That the same was true prior to their appointment appears from the averments of the bills and cross-bills. These pleadings disclose that all parties were aware that the system was being operated at a loss, and that proceedings to foreclose the mortgage would become necessary in the immediate future. (Record, pp. 232, 241.) If it were the fact that appellant's road ran behind, and if that fact furnished an excuse for refusing to pay it the rent due under the lease, the receivers would have been equally justified on the same grounds in refusing to pay any of the operating expenses of the system.

There is one fact which has a somewhat important bearing here. The system in its entirety was operated at a loss, and the receivers claimed that appellant's road was a burden to the system and that they were unable to operate it without incurring a deficit. Yet the evidence shows that in 1883, the year before the property passed into the receivers' hands, appellant's road was run at a profit, and it further shows that the gross earnings of the road after it went into the receivers' hands were greater than they had been during any portion of the anterior period.

On pages 171 and 172 of the record is a statement made by the officers of the Wabash Company to the Railroad Commissioners of the State of Missouri for the year 1883, from which it appears that appellant's line was operated at a cost of $1,432.80 per mile, while its earnings were $2,210.00 per mile, its operating expenses being only 64.8 per cent. of its earnings.

The gross earnings of the road prior to 1884 averaged only about $150,000 a year, the highest for any one year being $159,161, which was in 1883. (See allegation in Intervening Petition, Record, p. 9, which is admitted by the answers.) The gross earnings during the first year the road was operated by the receivers (March 1st, 1884, to March 1st, 1885) were $176,326.49 (Record pp. 166, 186), and for the second year (March 1st, 1885, to March 1st, 1886) they were $190,701,29 (Record, p. 203), showing a substantial increase over the gross earnings of pre-receiver times.

Even though it be conceded that our road was operated at a loss, it does not necessarily follow that it was a burden to the system. It is impossible to express in figures the exact relation any one portion bears to the system as a whole. It appears from the evidence that the mere fact that the actual receipts on any given portion of a system do not equal the actual operating expenses on that portion, furnishes no criterion as to whether the line is or is not a benefit to the whole; that it often costs one dollar to get sixty cents revenue, and yet the part of the line upon which such revenue is obtained may be of such importance as a "feeder," or otherwise, that it will not pay to lop it off. (Record, p. 130.)

It is pertinent to note here that the Master reported that the gross earnings of our road were diminished by reason of the bad state of repair into which the lessee had allowed the road to fall. (Record, p. 42.)

X. *Appelant's immediate lessee has always been able to pay the rent, and its ability to do so continued after the appointment of the receivers.*

This becomes a fact of vital importance in case it be held that the receivers may abandon a lease which they have

once adopted on the ground that it is not a beneficial one. It shows that instead of our road constituting a burden to the system, the system was a burden to it. We have already stated that the lease of appellant's road was the earliest in point of time of any of those composing the Wabash system. It appears that from the date of the lease until the time of the appointment of the receivers, there was no year in which the original lessee, the St. Louis, Kansas City and Northern Railway Company, did not earn more than its operating expenses and fixed charges, including under the term "operating expenses" the rentals paid to its various leased lines. This fact is alleged in the intervening petition of appellant (Record, p. 11); is admitted by the answer (Record, p. 27); is conclusively shown by the testimony (Record, pp. 127, 249, 251 and 254); and also appears by the Master's reports. (Record, p. 43, 256.)

XI. *The order of April 16th, 1885.*

On March 20th, 1885, being about ten months after their appointment, the receivers applied to the court for directions as to the operation of certain lines, among others that of appellant. The proceedings in connection with this application will be found on pages 261-273 of the record; the result of the application was that on April 16th, 1885, an order was entered directing the receivers to continue the operation of appellant's road, but to cut its operation down to a minimum. (Record, p. 271.)

XII. *The Master's reports on Appellant's intervening petitions.*

The Master found that the receivers did take possession of and operate appellant's road, but he held that they did not thereby adopt the lease, nor become liable for the

rent. He found that rent had accrued during the time the receivers were in possession in the several amounts claimed in the intervening petition and supplemental petitions, and recommended that these amounts should be allowed as general unsecured claims against the Wabash Company, with interest at 6 per cent per annum from the times when they respectively accrued. (Record, pp. 25-38; 45; 206-207.)

XIII. *Appellant's exceptions to the Master's report, and its subsequent efforts to obtain payment of its rental.*

The first report of the Master was lodged in the clerk's office on April 27th, 1885. (Record, p. 35.) At various subsequent dates he likewise lodged with the clerk his supplemental reports. Upon the lodgment in the clerk's office of these several reports, appellant presented to the Master its exceptions to each of them, which were duly considered by the Master, and, in the main, overruled. (Record, pp. 39-43.) Thereupon the Master filed his respective reports, and appellant filed with the court exceptions thereto within the time required by the rules of the court. (Record, pp. 187, 209.)

These exceptions may, for the purposes of this argument, be grouped under three heads:

1st. The failure by the Master to find that the receivers adopted the lease and became bound by its terms.

2d. His failure to find that appellant's claim for rent is a debt against the receivers superior in right to the lien of the mortgage, and is a part of the operating expenses of the system, and his failure to recommend that an order be made directing the payment of the same by the receivers.

3rd. The finding by the Master that appellant's road was a burden and not a benefit to the system, since such finding was not warranted by the evidence in the case, and, if true, furnished no defense to appellant's claim for rent.

On November 9th, 1885, preparatory to the final decree of foreclosure, the court made an order of reference to the Master to take and state an account. Among other provisions of the order is the following:—

"6. The said Master will also report the amount of indebtedness already incurred by the receivers herein, specifying the amount of receivers' certificates now outstanding, together with the date of issue and rate of interest thereon; also all other claims or accounts allowed and unpaid which have been declared to be, by order of this court, or other courts entertaining ancillary jurisdiction of this cause, liens superior in right to the liens of the mortgage securing bonds aforesaid, and the current indebtedness of said receivership to the date of his report, approximating said last named sum as nearly as possible." (Record, p. 191.)

In view of this order, appellant on November 21st, 1885, filed a petition, reciting the above paragraph of the order, setting out the amount due to it for rentals to September 1st, 1885, and asking that the same be allowed in said accounting as a claim against the receivers. (Record, p. 192.) This petition was by the master denied (Record, p. 194), and was afterwards denied by the court below. (Record, p. 222.)

The decree of foreclosure provided that the money arising from the foreclosure sale should be applied to the payment, among other things, "of all the indebtedness of the receivers and all other claims which said courts may adjudge to be superior to the said bonds." (Record, pp. 312-313.) A reference was made to the Master to determine the amount, etc., of such claims. (Record, p. 313.) On September 22d, 1886, appellant filed its application for payment of its rental out of the proceeds of foreclosure sale, claiming that its demand was covered by that portion of the decree just recited. (Record, p. 199.) This application was also denied by the court. (Record, p. 222.)

XIV. *The Circuit Court overrules appellant's exceptions and denies its application for the payment of its rents.*

The various exceptions filed by the appellant to the reports of the Master upon its intervening petition and several supplemental petitions, as well as appellant's applications of November 21, 1885, and September 22, 1886, were argued before the court below and were overruled. (Record, pp. 221–222.) The opinion of the court below will be found on pages 210–216 and 218–221 of the record.

It will be noticed that the opinion just referred to covers not alone the case of appellant, but also that of the Quincy, Missouri & Pacific Railroad Company, and the court treats the cases as substantially alike. It is necessary, however, to a complete understanding of our position, to note certain points of difference between the two cases.

1. The Quincy, Missouri & Pacific Railroad was one of those acquired after the consolidation of the Wabash with the St. Louis, Kansas City and Northern Railway Company, while appellant's road was a part of the latter at the date of consolidation.

2. The Quincy, Missouri & Pacific was subject to mortgage when it was acquired, and the Wabash Company assumed the payment of the interest; appellant's road had no encumbrance on it.

3. The Quincy, Missouri & Pacific was one of the roads especially mentioned in the report of the receivers, made to the court on June 26th, 1884 (Record, p. 246, 252), and as to which an order was made that the receivers should keep the accounts of the income and expenses separate. (Record, p. 260.) Appellant's road was not embraced in that report and order, and no special order was ever made to keep the receipts and expenses of our road separate.

XV. *The decree of foreclosure.*

On January 6th, 1886, a decree of foreclosure was entered in the consolidated cause, which decree will be found on pages 279 and following of the record. The court below expressly founds this decree, not on the bill filed by the Wabash Company, but upon the bills and the cross-bills of the trustees in the mortgages. The decree throughout treats the proceeding as one brought by a mortgagee to foreclose a mortgage, and is in form and substance a decree rendered upon the bill of the mortgagee and the answer of the mortgagor. (Record, p. 282.) The order confirming the sale recites that the Central Trust Company and James Cheney, who were the trustees in the general mortgage, are the complainants. (Record, p. 315.) In fact, the style of the case after the consolidation was "The Central Trust Company, of New York, et al., Complainants, *v.* The Wabash, St. Louis and Pacific Railroad Company, Defendants. (See pages 190, 278, 279, 314, 315, 319, 320, etc.)

The decree provides that upon the foreclosure sale the property shall not be withdrawn from the jurisdiction of the court, even though it should be delivered to the purchasers, until all claims of every character against the property or against the receivers shall be fully paid and discharged. (Record, p. 312.) A like provision is made in the order confirming the sale (Record, p. 317), and in the order for the delivery of the property to the purchasers. (Record, pp. 319, 321, 325.) So that the corporation which to-day holds and operates the Wabash Railway does so under the express condition that the entire property is still liable to any claims which may be found due from the receivers to any party.

XIV. *The Wabash Company paid all its interest until May, 1884.*

There was no default in payment of any interest on the General Mortgage bonds until June, 1884; and no default in payment of the interest on any of its bonds until May, 1884, when the interest on the comparatively small amount of collateral bonds was passed. These facts appear from the bill of complaint filed by the Wabash, from the decree of foreclosure, and from the petition filed by the receivers on June, 26th, 1884. (See Record, pp. 230, 246, 290, 291.)

Appellant makes the following

ASSIGNMENT OF ERRORS:

1. The court below erred in overruling appellant's exceptions to the reports of the master.

2. The court below erred in holding that the receivers had not adopted appellant's lease and assumed the covenants thereof, and that they were not liable for the rent sued for.

3. The court below erred in dismissing the intervening petition and the several supplemental intervening petitions of appellant.

4. The court below erred in denying the petition filed by appellant on November 21st, 1885.

5. The court below erred in denying and dismissing the application and petition filed by appellant, on September 22d, 1886.

ARGUMENT.

In making application of the legal principles governing the questions involved in this appeal, it is important to keep in mind that on May 29, 1884, only one of the parties to our lease was clothed with the right and power to exercise a choice as to its future status. The application for the appointment of receivers found appellant in the position of a lessor which had surrendered to its lessee all its property for a fixed term. If the Wabash Company had continued to be a going concern, that company would have been bound to pay appellant its rents until the end of that term. On the other hand, there was no way by which appellant could have terminated the lease or recovered possession of its property, so long as the covenants of the lease were observed by the lessee.

When the property passed into the hands of the receivers, appellant's position remained unchanged. It was still bound by the lease. It had neither the right nor the power to exercise a choice. However cogent might have been its reasons for desiring possession of its property, it could not say to the receivers: We will terminate the lease. It was equally precluded from saying to the receivers: We insist that you shall assume this lease and perform its covenants.

But this choice, which was denied to the appellant, did rest with the receivers. They could adopt the lease, or they could repudiate it. If the receivers had decided to repudiate it, and had refused to take possession of, and to operate appellant's road, appellant would have been compelled to submit. When they did decide to adopt the

lease and to continue the operation of the road, appellant's position was still that of simple acquiescence.

Our position was, therefore, a purely passive one; we had no power nor right to act in either way. Upon the receivers was cast the responsibility of acting. They did act; and appellant, as it was bound to do, submitted.

That party having acted upon whom rested the responsibility of action, and the passive party having acquiesced, as it was bound to do, the question to be determined on this appeal is, whether the party who acted shall be permitted to repudiate such action to the detriment of the party whose attitude was passive.

It would seem that there could be but one answer to this question, unless there exists in a court of equity the power to adopt all that is beneficial in a contract, and repudiate all that is burdensome. For the action of the receivers was on two several occasions (Record, pp. 239, 240, and p. 257) expressly sanctioned by the court which appointed them. If the action of the receivers in refusing to be bound by the convenant of the lease as to payment of rent is sustained, there is an end to the sacredness of contractual obligations.

I. *The receivers adopted ap[illegible]'s lease.*

1. The action of the re[illegible] the court, in May and June, 1884, can not be regarded [illegible] other light than as an adoption by the receivers of the lease and an assumption of its covenants. The law is well settled, and it was at that time well settled, that while persons upon whom a lease devolves in a trust capacity, or for the benefit of third parties, or by operation of law, are not compelled to adopt such lease, yet if they do adopt it they

are bound by all its covenants. The authorities to this effect are uniform.

Turner v. *Richardson*, 7 East, 335, 344;
Hoyt v. *Stoddard*, 2 Allen, 442;
Boyce v. *Bakewell*, 27 Mo. 492;
Hanson v. *Stevenson*, 1 B. & A. 303;
Thomas v. *Pemberton*, 7 Taunt. 206;
Ex parte Faxon, 1 Lowell, 402;
Pugsley v. *Aikin*, 11 N. Y. 494.

Says Jones, L. J.:—

"If the company, for its own purposes, and with a view to the realization of the property to better advantage, remains in possession of the estate which the lessor, therefore, is not able to obtain possession of, common sense and ordinary justice require the court to see that the landlord receives the full value of the property."

In re Lundy Granite Co., 6 Ch. App. 466.

And this language is expressly approved by Fry, J. in *In re Silkstone Coal & Iron Co.*, 17 Ch. Div. 160.

Lord Justice Mellish adds in the *Grundy* case (*supra*):—

"If the official liquidator, for the convenience of the winding up, does not surrender the lease, but continues to keep possession for the purpose of obtaining a better price for the goods, the landlord should not be deprived of his right to recover his rent." (6 Ch. App. 467.)

And he expresses the opinion that even a legislative act would not be construed to take away this right without clear and express words to that effect.

In *Woodruff* v. *Erie Railway Co.* (93 N. Y., 609, 623) the Court of Appeals of New York says:

"The receiver was not only thus authorized to assume the obligations of the lease and to bind the estate in his hands to the payment of the rent accruing thereon, but by entering into the possession of and occupying such leased property, he manifested by an unequivocal act his election to regard the continuance of such lease *as bene-*

ficial for all of the parties interested, and his intention to continue the interest acquired by the Erie Railway Company under such lease. He could not take possession of the property and enjoy its use and occupation *without incurring a liability for the payment of the rent under the lease* by which his predecessor secured its possession. The principles which govern the liability of an assignee of a lease seem to be applicable to the case of a receiver, and he would be equitably and legally chargeable with the payment of rent under a lease for such time as he continued to occupy the property demised."

In our case both the court and the receivers "by an unequivocal act" manifested their election to regard the "continuance of the lease as beneficial for all the parties interested." The receivers knew all about the condition of our property; and by making no objection to the order of the court, they "unequivocally" expressed the opinion that the order was proper. The mortgagees did the same by their express assent to the order. If the act of the receivers in taking possession of our road in the first instance was not conclusive, the continued operation by them of the road after we had filed our intervening petition claiming rent under the lease, was so.

We apprehend that even had the receivers immediately upon their appointment asked to be relieved of this lease, the court, in the absence of any complaint upon the part of the the trustees, or bondholders, would have hesitated to comply with such request. To such an application by the receivers alone the answer would naturally be, that so long as the parties most interested, who were also parties to the record, acquiesced in the order it was not for the receivers to move for its rescision. But, as a matter of fact, the acquiescence of the receivers was as marked and complete as that of the parties interested.

2. Only slight evidence of an adoption is required. In many of the cases the acts were apparently of little moment. But whether in themselves of great or little consequence, if they manifest an intention to use the leased premises as a part of the estate which they are administering as receivers, this is sufficient.

Thus in *Welch* v. *Myers* (4 Camp. 268) the assignees of a bankrupt were chosen on Saturday. The bankrupt was tenant of a pasture in which were certain cows belonging to him. The assignees allowed the cows to remain in the pasture over Sunday, on which day they were twice milked by their order; but they removed them early on Monday morning. It was contended in behalf of the asignees that there was no evidence of a holding by the assignees; that they had a right to a reasonable time to determine whether they would take to the demise or not; that having been appointed themselves only on Saturday, and having removed the cows on Monday morning, they must be considered as having repudiated the bankrupt's interest in the premises. But it was held by Lord Ellenborough that the milking of the cows on Sunday upon the premises by order of the assignees was a sufficient adoption of the demise to make them liable as tenants.

The same learned judge says in *Hanson* v. *Stevenson*, (1 B. & Ald., 307) that he "knew of no instance in which a deliberate act of taking possession has been curtailed of its full legal effect."

In the *Oak Pits Colliery Company's* case (L. R. 21 Ch. Div. 330) the court says it is sufficient to hold the liquidator as tenant if he keeps the property simply for the purpose of "doing the best he can with it." In this decision the distinction between cases where the receiver is held to adopt the lease, and where he is not so held, is clearly presented. The mere fact that he abstains from any effort to get rid of the lease, in other words, that he is

merely passive, will not make him liable. But if he takes any active steps, though they be slight ones, he is held.

The Supreme court of Alabama holds that taking possession of the leasehold estate and holding it for the benefit of the estate which the receiver is administering, though for ever so short a time, is the true test.

Dorrance v. *Jones*, 27 Ala. 633.

In that case the assignee took possession of the leased store and used it as a place in which to sell goods.

In *Thomas* v. *Pemberton* (7 Taunt. 206) one of the assignees, when notice to quit was served upon him, said he expected it. The other said, on one occasion, that he had nothing to do with the farm but to pay the rent. The assignees actually kept possession of the farm until the time mentioned in the notice to quit, and at least one of them occasionally gave orders to the men at work on it. These acts were held sufficient to show an election to take to the farm.

In the *Bridgewater Engineering Company's* case (12 Ch. Div. 181), where the liquidator retained possession of the leased property merely for the purpose of selling the machinery, plant and chattels which were on the premises, the court declined to hold that he had adopted the lease. This case goes as far as any of which we are aware to relieve the receiver. And it is questionable whether the court would have so held had there not been circumstances which strongly indicated that the leased property had been retained as much for the benefit of the landlord as of the tenant. See page 78, *post*.

Even though the receiver may say that he does not intend to adopt the lease, and puts his refusal in writing, nevertheless, if he does anything by way of using the premises, which he would have no right to do except as the assignee of the lease, he will be held to have adopted it. Says Abbot, C. J.:

"Although an assignee in words or in writing declares his intention to refuse the estate, yet if in fact he takes advantage of it, he is not relieved from the charges incident to it. A mere nominal dissent is not sufficient; it must be one in fact and in substance. If you think the defendant did take to these premises, and carry on the trade there for the benefit of the creditors, he has done more than the law allows an assignee to do before he exercises his right of declaring off. A reasonable time is permitted for that purpose; but no case has gone so far as to say that an assignee may continue to trade for the benefit of the creditors and after that refuse."

Clark v. *Hume*, Ry. & Moo., 207, 209.

And the fact must not be overlooked that the receivers adopted our lease with full knowledge of the condition and earning capacity of the property. (See statement, page— *ante.*)

3. This rule which in the above cases has been held to apply to executors, assignees in bankruptcy or insolvency, to assignees for the benefit of creditors, and to liquidators of corporations, is equally applicable to receivers. To this effect are all the authorities. We have been unable to find any decision to the contrary. Indeed we can conceive no reason why an exception should be made in the case of receivers.

The court below did not attempt to draw any distinction between receivers and the other classes referred to by the authorities. Notwithstanding the fact that counsel in their argument insisted upon such a distinction, none of the judges composing that court, neither the circuit judge, nor either of the two district judges before whom this case came during its various stages, intimated that such a distinction existed, but they repeatedly recognized the rule as applying to receivers as well as others. See Record, pp. 213, where the court says: "Such taking possession is an

acceptance of the lease and binds the receiver *as assignee*." See also pp. 218, 219. That the rule applies to receivers, is held in:

In re Brown, 3 Edw. Ch. 384;
Martin v. *Black*, 9 Paige, 641;
Commonwealth v *Insurance Co.*, 115 Mass. 278;
Woodruff v. *Railway Co.*, 93 N. Y. 609;
People v. *Insurance Co.*, 30 Hun. 142;
Gibert v. *Railroad Co.*, 33 Gratt. 586;
Miltenberger v. *Railroad Co.*, 106 U. S. 286;
Fosdick v. *Schall*, 99 U. S. 235;
Union Trust Co. v. *Ill. Mid. Railway Co.*, 117 U. S. 434, 475;
Kneeland v. *Amer. L & T. Co.*, 136 U. S. 89; S. C. L. Ed. Book 34, p. 379; 43 A. & E. R. Cas. 519;
Turner v. *Railroad Co.*, 8 Reporter, 453;
Easton v. *Houston & Tex. Cent. Ry. Co.*, 38 Fed. Rep. 784;
Welch v. *Myers*, 4 Camp. 368;
In re Lundy Granite Co., 6 Ch. App. 462;
In re North Yorkshire Iron Co. 7 Ch. Div. 661;
In re Engineering Co., 12 Ch Div. 181;
In re Silkstone Iron Co., 17 Ch. Div. 158;
In re Co-operative Stores, id. 161;
In re Brown, 18 Ch. Div. 649;
In re Oak Pits Colliery Co., L. R. 21 Ch. Div. 322;

It will be observed that some of the cases cited above are cases of winding up under the English statutes and the person adopting the lease is called "a liquidator." These officers are substantially the same as receivers. The official liquidator under the "Companies Act" of Great Britain is to all intents and purposes a receiver. The powers confered upon him and the duties to be performed by him correspond to those confered upon and to be performed by receivers appointed by courts in the exercise of their general equitable jurisdiction.

See 25 & 26 Vict. c. 89, sec. 92-97.

II. *The receiver of a railroad company occupies no different position from the receiver of any other corporation or of an individual.*

It was urged in argument below that a railroad lease stands upon a different footing, so far as it involves the question now at issue, from an ordinary lease, or from the lease of other kinds of property. The argument is that a railroad being a public highway, and operated for public benefit, public policy requires that it shall be kept in operation; and it is incumbent upon the court when it takes charge of railroad property through its receivers to see that all parts of the property, whether owned or leased, are kept in operation for public use, while no such necessity exists as to ordinary leasehold property. If this were true, it does not relieve the receivers from their obligation to pay rent so long as they do operate it. But we think the argument is more specious than sound.

The Supreme court of Texas, in a well reasoned case, refuses to accede to this view, holding that receivers of railroad property stand in the same attitude as those having charge of the property of an individual or a private corporation.

"A receiver," says the court, "as a general rule is but the agent of the court that appoints him with authority to take the possession and control of property, the subject matter of litigation. * * * He is liable as receiver for his contracts made in his official capacity and for the torts committed by his servants and agents in the operation of the road. By reason of the liability incurred by the operation of so much machinery and the employment of so many men, it may seem upon first blush that their liability is defined by a different rule from that which prescribes the liability of receivers in ordinary cases. But the rule is the same."

Brown v. *Warner*, 14 S. W. Rep. 1033.

Such, too, is the doctrine recognized by this court in

the *Kneeland* case, where, speaking through Mr. Justice Brewer, it says:

"So, if at the instance of any party rightfully entitled thereto, a court should appoint a receiver of property, the same being railroad property, and therefore under an obligation to the public of continued operation, it, in the administration of such receivership, might rightfully contract debts necessary for the operation of the road, either for labor, supplies *or rentals*, and make such expenses a prior lien upon the property itself."

Kneeland v. *Amer. Loan and Trust Co.*, 136 U. S. 89, 98; L. Ed. Book 34, p. 383; 43 A. & E. R. Cas., 527.

A railroad case was decided by Pardee, J., in the Circuit court for the Eastern District of Texas, in which the order appointing the receivers was not so full and pointed as in the case at bar. That order read as follows:

"To take possession of the money and assets, real and personal, road-bed, road, iron, ties, lands, rights of way, rolling-stock, leases, franchises, and all other rights of property whatsoever, of the said H. & T. C. Railroad Company, wherever the same may be found, with power to manage, control and exercise all the franchises whatsoever of the said railroad company, and in the meantime, and until another order of this court be rendered, to run, operate and manage the railways of the said defendant railway company, and to manage and control all of the said property and affairs of the said defendant railroad company."

The Court says:

"Under this authority, the receivers, with full knowledge of the obligations of the railway company, and the condition of the property furnished thereunder, did take possession of the lease and leased property, and operated the same, enjoying the privileges thereof, and all for the benefit of the trust fund. It would seem that under this state of facts, the receivers, fully authorized thereto, became the assignees of the railway company, and thereby legally and equitably *obligated themselves to perform the several covenants undertaken by the company* as to the care

and return of the leased property. The lease in question was an entirety; of necessity the assignment or assumption thereof was of the whole, and not of any particular part."

Easton v. *H. & T. C. Ry. Co.*, 38 Fed. Rep. 784.

Still, if all that is urged in this behalf by respondents be granted, we can not see that it furnishes any ground for denying, curtailing or injuriously affecting the rights of the lessor. That question was one to be considered by the court in the first instance in determining whether it would grant the prayer for the appointment of receivers. It was certainly incumbent upon the court before making such appointment to consider whether it would be for the benefit of parties affected by the bill that its receivers should take any leasehold which might constitute a part of the property of which it was asked to take charge through its receivers. And if it should appear that the receivers could not take charge of the property without incurring an obligation to continue the operation of its leased lines, that fact should have had its weight in determining the propriety of making the appointment.

Where the bill is filled and the application for receivers made by bondholders or mortgagees, it is the uniform holding of this court that the receivers appointed upon such application take the property *cum onere*; that if the mortgagees ask for receivers to take charge of and operate the property, they will be held impliedly to assent that such receivers may adopt the leases. Why should not the same principle hold, why not the same rule obtain, when the application is made by a party other than the mortgagee or bondholder, whether such party be the insolvent corporation itself, a judgment creditor, or some other party in interest? If the court, upon examining into the matter, finds that the property is burdened with such leases that it would

be unfair and unjust to other parties that the receivers should operate the roads leased, and yet that public policy required their continued operation, ought not the court to decline the application? Has not the lessor the right to suppose that the court, before granting the prayer, gave due consideration to these circumstances? Ought not the Supreme court to assume that all these matters were duly weighed by the Circuit court before it decided to take charge of and operate the road through its receivers?

III. *Positions taken by counsel for receivers in the court below examined.*

The principle announced in the cases we have cited, and the undisputed rule that where an assignee, liquidator or receiver intermeddles with the leased property, or keeps it for purposes connected with the administration of the estate, he becomes liable on the covenants of the lease, must, it seems to us, result in the reversal of the decree entered by the court below. The receivers certainly did intermeddle with our property; they certainly did use it for the purpose of carrying on the business of the estate which they were administering. Not only was there no request on the part of appellant that this should be done, but the property was taken possession of and the operation commenced without its knowledge. It was done for the benefit of the creditors of the Wabash Company, especially for the benefit of the mortgagees. It was done with the full knowledge and express consent of the mortgagees. We cannot conceive of any stronger case that can be presented. We confess that we are at a loss to understand upon what theory the court below declined to allow our claim for rent. The case was argued below by counsel of distinguished ability. It was decided by a court for which we have the highest respect. But we are compelled to say

with entire frankness that, after a most painstaking examination of the printed argument of counsel before the Circuit Court and of the opinions of the two judges who decided the case, we have been unable to find any valid ground upon which the decree in question can be sustained.

Two grounds were suggested by counsel below for the rejection of our demand. One was that appellant was a party to the suit instituted by the Wabash Company, and thus in some mysterious way lost its standing as lessor. The other was that the lease conferred no lien on the lessee's property, or, if it did give a lien, such lien was inferior and subject to the lien of the general mortgage and the various other mortgages upon the Wabash system and its component parts. The first of these involves a misapprehension of fact; the second a misapprehension of the legal propositions advanced by appellant.

1. We say the first ground, viz.: that appellant was a party to the suit instituted by the Wabash Company, is not true as a matter of fact. Though if it were true, we cannot see how it would affect the question at issue.

(*a*) When we say that it is not true that appellant was a party to the proceeding instituted by the Wabash Company, we do not wish to be understood as asserting that the Wabash Company did not attempt to make us a party. Appellant was undoubtedly named as one of the defendants. But it was not a party in fact, and could not be. The bill was filed by a corporation organized under the laws of Missouri and a citizen of that State. Appellant was a corporation of the State of Missouri and a citizen of that State. It is useless to argue so plain a proposition as that one citizen of a State cannot sue another citizen of that same State in the Federal court, unless the subject-matter of the suit is of a nature to confer jurisdection upon the Federal court without regard to the citizenship of the parties.

Even had appellant appeared and recognized the jurisdiction of the Circuit Court, that court would not thereby have acquired jurisdiction over defendant. We presume it may be admitted that the Central Trust Company did, by entering its appearance and filing its answer, waive any objection to being sued in a district other than that of its residence, and that as between the Wabash Company and the Central Trust Company the court below had juisdiction. But it had no jurisdiction in that suit over a citizen of Missouri, though the latter may have entered an appearance and filed an answer.

This objection is not waived by failing to raise the question by a plea in abatement. Says Mr. *Justice* Field in *Susquehanna &c. Coal Co. v. Blatchford* (11 Wall. 172): —

"The case was not one were a plea in abatement was required to raise the question of citizenship. Here the citizenship of the parties was averred in the bill of complaint and the consequent defect in the jurisdiction of the court is apparent, and a defect of this character thus disclosed may be reached on demurrer, or taken advantage of without demurrer on motion at any stage of the proceeddings. A plea in abatement is required only where the citizenship averred is such as to support the jurisdiction of the court and the defendant desires to controvert the averment. The question of citizenship constitutes no part of the issue upon the merits."

In the case at bar it not only appears from the allegations of the bill (Record, pp. 234–238), but it is shown over and over again in the record, that the Wabash Company and appellant were citizens of the same State. It is only by treating the proceeding as a foreclosure suit brought by the trustees of the general mortgage, who were citizens of a State other than Missouri, that it can be held that the court below acquired jurisdiction over appellant.

But the fact is appellant never did appear in the suit instituted by the Wabash Company. Its earliest appearance

in the Circuit Court was when it came as a stranger to the proceeding already instituted, and filed therein its intervening petition, asking that its rental be paid. It was at a later date made a party defendant in the suit filed in the State Court by the Central Trust Company and James Cheney. Whether by the removal of the last mentioned case into the Federal court the cause was transferred to that court so far as appellant was concerned, might be questioned. Counsel for appellant, without attempting to decide that question, thought it wise to file an answer, and did so on October 2, 1885, several months after the cause came into the Federal court by removal. But that answer was filed in the case of *Central Trust Company, of New York* vs. *Wabash, St. Louis & Pacific Railway Company*, and not in the case originally brought by the Wabash Company. (Record p. 277.)

It appears from the allegations of the bill filed by the Wabash Company that the idea was not entertained that jurisdiction could be acquired in that suit over this appellant. A paragraph near the close of the bill reads as follows: —

"And your orator avers that there is in this cause a dispute and controversy wholly between your orator and the said trustees under said general trust mortgage, and there is also a separate dispute and controversy in this cause wholly between orator and the trustees under the said several other mortgages herein set forth and that such controversy may be determined as between orator and the trustees under each of said mortgages without reference to the other defendants herein." (Record, pp. 234–235.)

We stand, therefore, as strangers to the original suit. We were not a party to it until after the trustees in the general mortgage had prayed for the foreclosure thereof, and for the appointment of receivers. We then appeared for the purpose of demanding the rental to which we were en-

titled, the receivers having adopted our lease and used our road.

(*b*) But if it be conceded that appellant was a party to the suit instituted by the Wabash Company, we emphatically deny that any such legal result would follow as was contended for by counsel in the court below. It would be a most startling proposition that leased property could be retained, so that all the benefits should be derived from the lease without the assumption of any of its burdens, by the simple process of filing a bill against the creditors, secured and unsecured, of the lessee, making the lessor a nominal party defendant, and having the property placed in the hands of receivers. This would be a novel but very effectual way of taking lessor's property without compensation for the benefit of the lessee's creditors.

In *Turner* v. *Railroad Co.* (8 Reporter, 453) the circuit judge for the seventh circuit held that the lessor was a party to the proceeding in the Federal court. But it does not seem to have occurred to him that such fact furnished any reason for declining to order the receiver to make payment of full rental, as well as damages for misuse of the leased rolling stock.

2. As to the second position taken by counsel in the court below, appellant has never claimed a lien, prior or otherwise, upon the property of the Wabash Company. We have always claimed, as we claim now, that the rental of our line was a part of the operating expenses of the system, as much so as the rental of a room for a ticket office would be; that it was an expense which the receivers were as much bound to pay as the lessee would have been had no receivers been appointed; and that, if there was not sufficient income, it should be paid from the proceeds of

the foreclosure sale. While the property was operated by the lessee, it did not concern us from what source the funds came with which our rental was paid. When the receivers adopted the lease, and operated our line, it did not concern us from what source the money should come to pay our rental. The court below had no difficulty in obtaining money to pay all the other expenses of the receivers. It would have had no difficulty in obtaining money to pay our rental. The means of payment are fully provided for in the final decree, in the deed to the purchasers at the foreclosure sale, in the order confirming the foreclosure sale, and in the order for delivery of the property to the purchasers. (See statement, *ante*; p. 27.) And the purchasers were and are subject to the judisdiction of the court. *Kneeland* v *Amer. L. & T. Co.*, 136 U. S. 89.

While we claim no lien, in the strict sense of that term, we do insist, as we always have insisted, that this rental, like all other expenses incurred by the receivers, takes precedence of the general mortgage and all other mortgages. But this is not placed upon the ground that our lease gives us a lien, but on the ground that the receivers as our lessees are liable for the rent, and that no mortgagee can ask to have any money paid to it until this rent has been paid. We will discuss this point more fully under the next head.

IV. *Grounds of the decision of the court below examined.*

1. Opinion of the circuit judge.

It is not necessary to note further the positions taken by counsel in the court below, as it does not follow that the the same grounds will be urged by them in this court. It is of more importance to consider the grounds upon which the circuit court based its decree.

(*a*) They state appellant's position as follows: —

"The intervenor's claim, of course, is that the rentals due them are preferential debts and should be paid prior to the mortgages." (Record, p. 213.)

That we may be clearly understood on this point, we repeat what we have stated above; we do consider our claim for rental to be a claim prior to that of any mortgagee, just as any expense incurred by the receivers is a debt to be preferred to the mortgage debts. We say again: The receivers became our lessees, and we look to them to pay our rent. No mortgagee has a right to ask that one dollar be applied to the payment of the bonds secured by the mortgages until the receivers have paid our rent in full.

(*b*) That the view taken by the judges below may be fully understood, we shall make somewhat copious extracts from their opinions. On page 213, the circuit judge says: —

"We start with this fact, that prior to the appointment of the receivers, intervenor's claim was subordinate to that of the mortgagees. It was a claim, of course, good against the income, but not against the corpus; at least not good against the corpus until after the payment of the mortgages. And the first question is whether the action of the receivers in taking possession, or of the court in ordering possession, changed the status, and gives to intervenor's claim a higher position than it theretofore had."

Now, there certainly must have been in the mind of the court when writing this part of the opinion a misapprehension as to the facts. No claim on the part of intervenor existed prior to the appointment of the receivers. Its accrued rent had been paid to the end of the half-year preceding May 29, 1884, and no further rent became due until the first of September following the receivers' appointment. Consequently, there was no status to be changed by the appointment of the receivers, since there was no claim then existing to be affected by such appointment. The only claim we have is against the receivers. It accrued

due after they were appointed, and because they had become our lessees. Taking, as they did, in the middle of the half-year, they were liable for the rent of that half-year, as we shall show at a later stage of this argument. But we are not in the attitude of creditors seeking to enforce a debt which existed against the Wabash Company at the time the receivers were appointed.

The debt which the receivers incurred, we do insist, should be paid out of the corpus, if the income is insufficient. This rent was an expense of administration of the estate committed to their charge, and justice requires its payment. That not only the income is liable for the rentals, but the corpus also, in case the income is insufficient, is settled by the decision of this court in the *Illinois Midland* case, where Mr. Justice Blatchford says:—

"Of course such items are payable out of income, if any, before the corpus is resorted to; but that may be resorted to when the items are proper ones to be allowed for operating expenses, after scrutiny and opportunity for those opposing to be heard."

Union Trust Co. v. *Ill. Mid. R. R. Co.*, 117 U. S. 434, 464.

And in a preceding portion of his opinion he says that the bondholders have no ground of complaint if the court below charges "*upon the property*" such expenditures as appear to have been rightfully made by the receivers (p. 461).

It was also held that the power of the court to order such payment out of the corpus was not affected by any limitations contained in the original order appointing the receivers.

The same view was taken, though not so fully expressed, in the earlier case of *Miltenberger* v. *Railroad Co.*, 106 U. S. 285, 304–5.

The rule applied in the *Illinois Midland* case to receivers'

certificates equally applies to the debt incurred in this case for rentals. Says Mr. Justice Blatchford:—

"Nor have the bondholders any ground of complaint, if the court charges upon the property such expenditures as now appear to have been rightfully made in the interest of all concerned in its management while in the hands of the receiver. As to receivers' certificates issued with the sanction of the court, after the trustees became parties, the purchasers and holders should be accorded such rights as, by the settled principles of equity, are accorded to those who deal with judicial tribunals having jurisdiction in the premises."

Union Trust Co. v. *Ill. Mid. R. R. Co.*, 117 U. S. 434, 461.

There surely is no ground upon which the holder of a receiver's certificate can claim superior equities to those of the lessor of a railroad which receivers have taken into their possession and operated. The lessor, equally with the holder of a receiver's certificate, has dealt with a "judicial tribunal having jurisdiction in the premises." The lessor, equally with the holder of the certificate, is an innocent party, relying in good faith upon the action taken by the court through its receivers, and is in the highest degree entitled to be dealt with fairly and equitably.

We think the rule laid down in the *Fosdick* case (99 U. S. 235) applies to the claim of appellant. The terms of our lease made it imperative upon the lessee to put and keep the leased road in proper condition. This the lessee never did (see statement, pp. 2 and 11, *ante*). Had it performed this obligation, it would have laid out upon our road, prior to the appointment of the receivers, at least $100,000 more than it did. This sum, which we had every right to demand should be expended upon the road, was used by lessee to pay the interest on the bonds of the parties now seeking to foreclose their mortgages. All the interest that had matured down to the date of

the appointment of the receivers was paid in full (see statement, p. 28, *ante*), and it was paid in part, at least, with money that should have been laid out on appellant's line. By reason of the failure of lessee to keep this convenant of the lessee, by reason of its using in the payment of interest on the bonds the moneys that should have been appropriated to the purposes of repair and renewal of the leased property, there devolved upon the receivers a necessity to expend over and above legitimate operating expenses, a sum largely in excess of our rental. In other words, had lessee done its duty, had it not diverted the funds to the payment of interest on the bonds, the expenditures necessarily laid out by the receivers on appellant's road would have been sufficiently diminished to have paid our rent, or at least a large portion of it. This brings our case fully within the principle upon which the decisions above cited rest. We are entitled first to payment from the earnings in the hands of the receivers. No one else is shown to have any claim on them superior in equity to ours. Should it appear that such earnings are insufficient to pay our rent, payment should then be made out of the proceeds of the sale, in preference to any application of such proceeds to payment of the mortgage bonds.

It will be observed that in the order of May 29th the court did not limit the fund out of which the rent was to be paid to the income. The direction is to pay out of the income "or otherwise."

Mr. High puts all the expenses incurred by receivers on an equal footing. He says: —

"As to rights of action which may be maintained against receivers, they are in general the same which may have been maintained against the person to whose estate and rights the receiver succeeds." (*High on Rec.*, Sec. 395.)

That is, the receivers stand *pro hac vice*, as to expenses

incurred while they are in charge, in place of the corporation itself. This rent is one of those expenses. And the justice of our claim can no more be disputed than could that of any other class of expenses mentioned.

It is held by the South Carolina courts that a claim for damages arising from injuries received while the road is in the hands of a receiver is a debt arising in the operation of the road. (*Ex parte Brown*, 15 So. Car. 518.) So the courts of Kentucky have held (*Douglas* v. *Cline*, 12 Bush, 609), and other courts, both State and Federal. (*Cowdrey* v. *Railway Co.*, 93 U. S. 352.) This court, in commenting upon the *Cowdrey* case, says: "This puts claims against the receiver in his capacity as a common carrier on the same footing precisely as the salary of his subordinates, or as claims for labor and material used in carrying on the business." (*Barton* v. *Barbour*, 104 U. S. 126.) Surely such claims possess no greater merit than one for rent of a road which is operated by a receiver.

Nor is the claim for services of counsel more meritorious than one for rent. Yet such claim has frequently been allowed under orders similar to that made by the court below.

See cases above cited, also

Baylis v. *Railroad Company* (U. S. C. C. Ind.), 8 Rep. 579;

Turney v. *Railroad Company*, 58 N. Y. 358.

The English courts find no difficulty in holding the rent to be a part of the operating expenses. In one case where offices had been let to a company which was ordered to be wound up, and the liquidator had for the pnrpose of administration retained possession of the offices, the court said that such rent was a part of the administration expenses.

In re Progress Assurance Co., L. R. 9 Eq. 370.

Lindley, L. J., says, *In re Oak Pits Colliery Co.*, (L. R. 21 Ch. Div. 330):—

"If the liquidator has retained possession for the purposes of the winding up, or if he has used the property for carrying on the company's business, or has kept the property in order to sell it *or to do the best he can with it*, the landlord will be allowed to distrain for rent which has become due since the winding up."

And he says further:—

"When the liquidator retains the property for the purpose of advantageously disposing of it, or when he continues to use it, the rent of it ought to be regarded as a debt contracted for the purpose of winding up the company, and ought to be paid in full *like any other debt or expenses* properly incurred by the liquidator for the same purpose."

And that the value of the leasehold does not affect this question, appears from the remaining portion of the paragraph from which we have just quoted.

"In such a case," he says, "it appears to us that the rent for the whole period during which the property was so retained ought to be paid in full, without reference to the *amount which could be realized by a distress*."

The Supreme Court of New York takes the same view. In *People v. Insurance Co.* (30 Hun, 142), they say that in such a case the rent "would not be a claim to be paid *pro rata* with debts of the company; it would be like his (the receiver's) necessary expenses, *a charge on the fund*."

(*c*) To the following language of the circuit judge we take no exception:—

"The idea which underlies this bill is that which underlies the action of a voluntary bankrupt under the bankrupt law. Finding himself insolvent, he surrenders his property to the court to be disposed of for the benefit of his various creditors. Such action in no manner changes the relative rights of his various creditors. They stand sub-

sequent to this action as they did before, and their various rights and equities are determined, not by his action in surrendering his property to the custody of the court, but by the terms and obligations of the contracts theretofore entered into." (Record, pp. 214, 215.)

We are entirely content to stand upon the doctrine here announced. An unsecured creditor of a bankrupt could not expect that his debt should be changed to a secured one by the facts of the bankruptcy and the appointment of an assignee. And this applies to a lessor of the bankrupt, so far as the rent due at the time of the bankruptcy is in question. But such lessor would expect to be paid his future rent in full, in case the bankrupt's assignee took possession of the leased property. So in the case at bar, if the Wabash Company had failed to pay the rent accruing before the half-year in which the receivers were appointed, appellant would have stood, so far as that rent is concerned, in the attitude of an unsecured creditor; and would not expect that debt to be paid in preference to the mortgage debts. But coming into court, as we have, to recover rent accruing after the appointment of the receivers, and after they had taken possession of our property and adopted our lease, we do expect it to be paid in full, on the same ground that an assignee in bankruptcy who had adopted the lease would be expected to pay the rent.

It happens that this identical question has come before the English courts on more than one occasion, and the distinction has been uniformly recognized and declared. It is expressed by Fry, J., in the following terse language:—

"It is hardly in controversy between the parties that, roughly speaking, the rent which accrued before the liquidation should be matter of proof, and the subsequent rent a matter of full payment."

In re South Kensington Co-op. Stores, 17 Ch. Div. 164.

And in a later case he uses the following language:—

"Those are the two principles to be considered. In

their generality they are manifestly inconsistent. In my view they are to be reconciled by drawing the line at the date of the winding up.

A mortgagee and a lessor, although in one sense independent persons, are, nevertheless, creditors of the company in respect to any amount due on the mortgage or lease at the date of the winding up, and as such creditors, they ought, in my judgment, to have neither preference nor priority. In respect to any rights arising after the winding up, by reason of the company or the liquidators remaining in possession of the demised or mortgaged premises, they must so remain upon the terms and conditions of the instrument; just as any other person must observe those terms." *In re Brown*, 18 Ch. Div. 652.

[This placing the mortgagee and the lessor in the same class is explained by the particular facts of that case. The winding up was a voluntary one on the part of the company. Prior to the resolution that the winding up be had, the company had executed a mortgage on a portion of its property, which mortgage contained a provision giving the trustees a right to enter upon the property of the company and distrain certain chattels there which were not covered by the mortgage itself. It was with reference to this right of distraint that the learned judge used the language above quoted.]

The same view is taken in *In re North Yorkshire Iron Co.*, 7 Ch. Div. 664.

So in the *Oak Pits Colliery Company's* case (L. R. 21 Ch. Div. 322), it was held that as to the rent in arrear at the commencement of the winding up, the landlord had only the remedy of other ordinary creditors. But as to the rent accruing after the commencement of the winding up the landlord was entitled to be paid in full.

(*d.*) The court below correctly says (Record, p. 213) that appellant strenuously insists that the receivers by taking possession of its road became virtually the assignees of

the lease, and bound by its terms; and that they were so bound that the entire Wabash property was liable for the payment of the rent, in preference to the lien of the mortages.

We think all the authorities announce this doctrine, and that no other rule has ever been suggested in cases of this character. The principle upon which we rely is clearly stated by the circuit judge in the closing part of the paragraph from which we have just quoted, and which reads as follows:—

"Where a mortgagee institutes foreclosure proceedings, and upon his application a receiver is appointed, and such receiver takes possession of property leased by the mortgagor, *such taking of possession is an acceptance of the lease and binds the receiver as assignee*, and binds so as to concede a *preference* to the lessor in respect *to his rental*. In other words; if A., a mortgagee, commences fore losure proceedings against B., a mortgagor, and a receiver, appointed at his instance, takes possession of the property of C., leased by B., *such possession of the leased property is an acceptance by the receiver of the lease, makes him an assignee of the lessee, and binds both him and A., the mortgagee, to the full amount of the mortgaged property, to the payment of the rents.*" (Record, p. 213.)

This language describes the precise attitude in which appellant stands. We have nothing to do with the fact that the receivers were at first appointed at the instance of the mortgagor. The fact remains that they were appointed because the mortgagor satisfied the court that the interests of all the then existing creditors of the Wabash Company demanded their appointment. The appointment was made, therefore, not for our benefit, since appellant was not a creditor of the Wabash Company, the Wabash Company owing us nothing at that time.

Though the appointment was not made in the first instance at the instigation of the mortgagees, nor, perhaps in the sole interest of the mortgagees, yet this fact does not at

all change the character of the proceeding. It appears from the bill that its sole ultimate object was that there should be a foreclosure. (Record, pp. 232–233.) And, *within two weeks* after the bill was filed by the Wabash Company, the trustees in the general mortgage came into court with their cross-bill, praying for the foreclosure of their mortgage and the appointment of receivers. (Rec., p. 241.) Nor does the fact that new receivers were not appointed at their instance affect the question, since the court considered that the receivers already appointed were practically acting for the mortgagees (Record, p. 243), and they held possession for their benefit until the foreclosure sale. From the date of filing the cross bill, June 9, 1884, the proceeding was one to all intents and purposes by a mortgagee against a mortgagor. The decree of foreclosure expressly excludes the bill filed by the Wabash Company, and is based solely upon the bills and cross-bills filed by the mortgagees. (Record, p. 282.)

In view of these facts, the case of *Kneeland* v. *American Loan and Trust Company* (136 U. S. 89; L. Ed. Bk. 34, p. 379; 43 A. & E. R. Cas. 519), is one of exceeding importance. There the original bill was filed and application made for a receiver by a judgment creditor. Several months afterwards the trustee in the mortgage came in and prayed for a foreclosure and also asked the appointment of a receiver. The mortgagees appeared to the original bill, and neither objected nor consented to the appointment of the original receiver; but when they asked for a foreclosure and the appointment of a new receiver, their prayer on both points was granted.

The only points of difference between that case and the one at bar are that in our case the mortgagees, instead of waiting for four months, came in immediately with their cross-bill, praying for a foreclosure and the appointment of receivers, and that the court so far refused the latter part

of their prayer, that it declined to appoint new receivers. It is not easy to perceive any substantial difference between the two cases. In both the mortgagees availed themselves of proceedings already commenced to obtain a foreclosure of their mortgages. In our case the old receivers became practically the receivers of the mortgagees after the latter had filed their cross-bill.

In the *Kneeland* case, this court held that the receivers were liable for rental; that from and after the time the mortgagees filed their cross-bill, such rental was to be paid in preference to the mortgage debt; but that during the time the receivers held only under the appointment made at the instance of the judgment creditor, such rental was not a debt to be paid in preference to the mortgage debt. The reasons for this latter conclusion were that the judgment creditor instituted the proceedings only for the purpose of *reaching the surplus earnings* for the satisfaction of his debt, and that no one, least of all the mortgagees, was asking the court to take charge of the entire property; *also that the court did not order the receivers to rent the rolling stock in question until after the mortgagees came in with their cross-bill.*

This marks an important distinction between the *Kneeland* case and the one at bar. Not until the mortgagees came in asking for a foreclosure and the appointment of receivers to take charge of the entire property, did that case become similar to the one now before the court. In our case the receivers were at the very inception appointed to take charge of the entire property, not for the purpose of sequestrating the surplus income, but for the purpose of selling the whole. (Record, p. 232.) The mortgagees not only assented to their appointment and to their taking possession of the whole property, but in less than two weeks the trustees in the general mortgage came in with their prayer for a foreclosure and themselves asked that

the receivers should take charge of the property as a whole. Our case was, therefore, from its inception, of the same character as the *Kneeland* case became after the cross-bill was filed by the mortgagees.

That part of the opinion of this court which covers the time after the cross-bill was filed by the mortgagees, must, therefore, govern the decision of this case. The court, speaking through Mr. Justice Brewer, says:—

"On the 1st of December, 1883, however, the situation was changed. At that time the mortgagees upon the realty commenced suits to foreclose their mortgages, and at their instance a receiver was appointed for all the property, both real and personal. In respect to the question here involved, the case is as though this was the commencement of judicial proceedings; and in that respect the attitude is this: The railroad company owned real and personal property, each subject to a separate lien. The holder of the lien upon the realty commences suit to foreclose its lien, and asks the court to take possession through its receiver, of both the real and personal property. In the latter it had a remote interest, though subordinate to existing liens. The court responding to its demands, takes possession of all the property, real and personal. Now, when the holder of a first lien upon the realty alone asks the court of chancery to take possession not only of the real but also of the personal property used for the benefit of the real, that application is a consent on its part that the rental value of the personalty thus taken possession of and operated for the benefit of the realty shall be paid in preference to its own claim. The proposition is a simple one. The application may not be a consent that the contract price of the personalty shall be paid in preference to his lien, but it certainly is a consent that the rental value of that personalty, during the time of the possession by the receiver appointed at his instance, may have priority to his claim. If the holder of a lien upon the realty does not think that the continued possession of the personalty is a benefit to his lien, he should simply omit the personalty from his bill, and ask the court to take possession of the realty alone. But either because he believed that the possession of the

personalty was necessary for the operation of the railroad and the security of his claim; or else because, by virtue of his secondary right he expected to pay for the personalty and retain both the personalty and the realty,—he has had the court take possession of both by its receiver; and by that act, although subsequently the personalty was returned to the holder of the lien upon it, he consented to the payment of reasonable rental pending the receiver's possession. The conclusion is irresistible that under the circumstances reasonable rental value was properly allowed as a prior claim to the mortgage indebtedness. * * *

The initiative in the matter was taken by the trustees. They asked by their bill that the court take possession of all the personalty. If more than was needed, it was their mistake. The court is not to be assumed to be an experienced railroad manager, knowing exactly the amount of rolling stock needed for the operation of the road. It may justly assume that what had been contracted for was necessary, and if the trustees ask that all may be taken possession of, it may act upon that as a declaration that all is necessary, and that rental value is to be paid for all. Theirs is the inquiry and not the court's. It is a mistake to suppose that their duties in respect to the foreclosure proceedings are formal merely, or limited to the employment of counsel and the handling of securities. They assume all the obligations of a party to the suit. They are charged with the care of the entire mortgage interest. They ask and receive large allowances for caring for that interest; and it is a part of their duty to make examination and become fully informed in respect to the property, its liens, what is needed for its operation, and what can prudently and safely be dispensed with. Upon such information, their application should be based. * * * And the taking possession of all the property they name is in reliance upon their representation that all is needed for the operation of the railroad and that they consent either to the payment of the unpaid purchase price of any property thus taken possession of, or a reasonable rental for the use of the same. * * * Can it be held that such possession, taken at the instance of the trustee, casts no burden on the

road, either for the purchase price or rental prior to the claim of the original mortgage? Can the trustee forcibly, through the power of the court, compel an appropriation of this rolling stock for the benefit of the property subject to its lien without compensation? Does not its application for possession carry with it an assent that rental for such rolling stock shall be first paid, as one of the expenses of the receivership which it has invoked? But one answer can be made to this inquiry, and that is that its application is a consent to the payment of reasonable rental during the possession of the receiver — a rental not based upon the use actually made by the receiver, but on the ordinary value of the rental of such property. * * * Such value is not to be determined by the amount of actual use, but by what, in the first instance and before the use had been had, would be adjudged a reasonable rental value."

Kneeland v. *Am. Loan & Trust Co.*, 136 U. S. 100; L. Ed. Bk. 34, p. 384; 43 A. & E. R. Cas. 528.

That part of the above quotation which speaks of a "reasonable rental value," has no application to the case at bar. In the *Kneeland* case, that which was called "rental" was simply an annual installment on the purchase money which bore no relation to the actual rental value of the rolling stock. The case is, therefore, not an authority for holding that we are entitled here to recover only on a *quantum meruit*. It may be said, however, in passing, that there is not the slightest evidence in this record tending to show that thirty per cent. of the gross earnings is not a reasonable rental of railroad property. This point we shall discuss later.

The decisions of the Court of Appeals of New York are in harmony with those above cited. That court says:

"The jurisdiction of a court of equity having possession, in a foreclosure action, through its receiver, of the property of a railroad company, to authorize the creation of debts for rolling stock and other purposes, when in its opinion it is necessary so to do to secure the continued successful operation of the road, and to charge the debts so created as a

first lien on the mortgaged property, has of late years been the subject of consideration by the courts, and the doctrine that this jurisdiction appertains to the power of the court to appoint receivers, is now firmly established."

Vilas v. *Page*, 106 N. Y. 451–2.

In the above case the purchase of rolling stock was made between the foreclosure sale and the confirmation of it, and was upheld as a prior lien.

The only ground upon which full payment can be denied to a party dealing with receivers is that mentioned in the following extract from the opinion of Mr. Justice Brewer in the *Kneeland* case, referred to above. He says:

"No one is bound to sell to a railroad company, or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens." (136 U. S. 98.)

The converse of this must be equally true. Where one is bound to sell to the receivers of a railroad company, or to work for them, where one is powerless to object to the act of the court or its receivers in taking possession of its property, its rights should be held superior to those of the mortgagees. And this is eminently true where, as in our case, at the inception of the lease the rights of the mortgagee had not attached. We repeat what we have heretofore said. In this matter of the operation of our road by the receivers, we had no option. They had the legal right to take possession of our property and operate it, and appellant had no power to prevent it. Our original lessee has always been solvent, and the contract out of which arose our right to payment of rent from our lessee was prior to the placing of any mortgage which affected our road. Under the law quoted above from the *Kneeland* case, we cannot see any escape from the conclusion that

our rent should be paid in preference to any mortgage debt.

(*e*) One or two other points discussed by the circuit judge demand notice. He remarks (Record, p. 214):

"This receivership was upon the application of the mortgagor, a party in possession of various properties, some owned, some leased, and all subject to various obligations. Could the action of the mortgagor or the decision of the court upon his application change the relative rights of the mortgagee and the lessor? Was it in the power of the court upon the application of the mortgagor alone to charge the mortgagee with obligations to which he never assented?"

It occurs to us that in putting these questions certain very important facts have been overlooked. We respectfully insist that whatever was the status of appellant after the date of the appointment of the receivers, it was well known and expressly assented to by the only mortgagees which had any lien on our property. Before the bill was filed, the trustees in the general mortgage had notice that it was to be filed and had received a copy of it. If those trustees were unwilling that receivers should be appointed under the prayer of that bill (Record, p. 236), and for the purposes therein expressed, they had the opportunity at once to make known their objection. They failed to do so. They not only failed to interpose any objection, but immediately thereafter came in with their own cross-bill and asked the specific relief of foreclosure, and on their own behalf urged the appointment of receivers. In view of these facts can it be said that we are attempting to "charge the mortgagee with obligations to which he never assented?"

But the assent of these trustees was manifested even more unequivocally. By a formal and solemn pleading filed in the intervention proceeding of appellant, they admitted that

the receivers had adopted the lease, and their answer does not contain an intimation that such adoption was otherwise than right and proper. (Record, p. 33.)

The assent of the Iron Mountain Company, the only other mortgagee with which we are concerned, is equally explicit. Two days after the order was entered appointing the recivers, they came into court and expressly consented to that order. (See Supplemental Record.)

This court has uniformly held that where trustees are made parties to the suit they thereby have due notice of all applications and orders made in the progress of the case; and that "the bondholders are represented by their trustees and must be regarded as bound by their acts, so far as concerns the power of the court to act in making the orders, and so far as the interests of third persons acting on the faith of it, might be affected." *Wallace* v. *Loomis*, 97 U. S. 146, 163; see also the *Kneeland* case, *supra*.

In view of the fact that the decree of sale, as well as the order confirming the sale, expressly makes the property purchased subject to our claim, if it is held to be a valid one, it becomes important to notice that the purchasers at foreclosure sale are likewise parties to this proceeding, and are subject to the jurisdiction of the court. (*Kneeland* v. *Am. L. & T. Co.*, 136 U. S. 89.)

In *Miltenberger* v. *Railroad Company* (106 U. S. 286), the bill was filed by second mortgagees, and receivers were appointed without prior notification to the first mortgagees. The trustee in the first mortgage was, however, made a party, and afterwards came in and filed an answer and a cross-bill. Later, the bondholders under the first mortgage, came in and filed a cross-bill. The receiver, during all the time that he was in possession of the property, operated the Evansville & Crawfordsville Railroad, under a lease of that road to the mortgagor. The first mortgage bondholders objected to various expenditures of the receiv-

er, and, among others, to the rental paid to the Evansville railroad. This court held that the expenses of the receiver when proper, were to be paid in preference to any mortgage debt, and that the rent to the Evansville & Crawfordsville Railroad was a proper expenditure. As to this rental, the court, speaking through Mr. Justice Blatchford, says:—

"We see no valid objection to this allowance. It is on the basis, not of the lease, but of the actual value of the use of property used by the receivers, with the clear assent, under the circumstances, of all parties interested, which use the first mortgage bondholders and their trustee, chargeable with full knowledge, never sought to prevent; such use being founded on the lease, which was property in the hands of the mortgagor. The line was used for the benefit of the mortgagor's road and of the holders of the bonds under the mortgages, with their acquiescence. Whatever the court would have done, as an original question, if called on to determine whether the receiver should use and run the Evansville road, these appellants must now be held, in view of all the facts, to have consented to treat the right to run that road and take its income as if that right were a part of the mortgaged property and subject to the same rules as the other mortgaged property." (pp. 313, 314.)

And in that case the rental was allowed as a preferential debt to be paid out of the corpus, if the income was insufficient.

Referring again to the above portion of the circuit judge's opinion, we are unable to perceive that "the relative rights of the mortgagee and the lessor" were, as a matter of fact, changed in any respect. While the Wabash Company was a going concern, the mortgagee had no right to interfere with the use by that company of its income or property for the payment of the rents. After the property went into the hands of the receivers, the mortgagee was equally precluded from objecting to the use of the income or property by them to pay rentals accruing on leases adopted by them. The relative status of lessor and mortgagee was the same after the receivership as before.

(*f*) In continuation of his opinion, the circuit judge says (pages 214–215) that where there are claims by two creditors, one secured and the other unsecured, there is no rule of equity by which the rights of the secured creditor can be postponed to those of the unsecured creditor. But we respectfully ask in what sense was the appellant an unsecured creditor? Of whom was it an unsecured creditor? Not of the Wabash Company, surely. For, as we have repeatedly stated, the Wabash Company had paid us in full up to the end of the half-year preceding the appointment of the receivers. When appellant became a creditor it was a creditor not of the Wabash Company, but of the receivers. The mortgagee was not a creditor of the receivers.

The real question then is: Shall a creditor of the receivers, though unsecured, if you please, be preferred to a secured creditor of the Wabash Company? It seems to us that the statement of the question is its sufficient answer. The receivers are bound to pay their own debts before the creditors of the Wabash Company, secured or unsecured, have any claim on the funds.

On page 216 the circuit judge says there "certainly was nothing in the action of the court or the various orders made by it which gave to any party the right to expect other than his legal claims." This we do not deny. What we do insist on is that the court plainly told us that all our legal claims should be paid; and that we were fully warranted, both by the orders of the court and the acts of the receivers, in expecting that all our legal claims would be paid. We have a "legal claim" to the rent accruing on our lease after the receivers became assignees of it. This legal claim is all we are seeking to enforce.

2. Opinion of District Judge.

(*a*) The District Judge in his concurring opinion, which

will be found on pages 218–221 of the record, advances some additional reasons for denying appellant's demand. He says (p. 219):—

"The receivership was not created for the benefit or protection of any one interest or class of interests, but for the benefit of all parties to the suit who were in any wise interested in the system. The lessor companies whose roads went into the possession of the receivers were advised of such facts by the form of the bill and by the prayer for relief."

We respectfully ask what clause in the bill even indirectly indicates that its object was to protect the rights or interests of any of the lessors? The rights of creditors are repeatedly mentioned. But we find no mention of or reference to the rights of the lessors. The references to leaseholds are all such as to show that it was the interest of the complainant and its creditors which it was intended to protect, and not the interests of the lessors. Thus, on page 230, it is stated that unless provision is made for the payment of the rentals, the orator's lease-hold interests *will be forfeited and lost*. On page 231 the fear is expressed that orator's lines will be broken into fragments *and the unity of its system destroyed*. But this is deprecated, not because the lessors will suffer thereby, but because such destruction of the system would prevent the realization of a revenue from these lines and because *the interests of orator and of its creditors and bondholders* would be thereby greatly imperiled. And on the same page the complainant asserts its belief that it was bound to protect said property and to treat the same as a trust fund for the security, *first*, of its *creditors*, and then of *orator's stockholders*. (No anxiety expressed as to the interests of lessors.)

On page 235 the complainant expresses its opinion that it is important that the operation of its lines should not be interrupted; but important to whom? To "*your orator*

and its creditors." And the bill concludes (p. 236) with a prayer that such order be made in the premises "as will insure the protection of the interests of *orator and its creditors*,"— and let all others be heard afterwards.

That the interests of the lessors was the last thing which complainant had in mind, is further manifest from the paragraph in the middle of page 233.

"Orator also prays that such orders be made as would enable such receivers to raise money with which to pay all rentals accrued or accruing, the payment of which are necessary *to prevent the forfeiture of orator's valuable leasehold interests*, and thus prevent the breaking up of orator's lines."

We insist that by the terms of the bill and the prayer for relief, the sole matter as to which the lessors were advised was, that complainant desired to hold their respective roads, and to this end desired that the rentals should be paid; and that this is the only reasonable interpretation to be placed upon it. On page 233, we find this prayer:—

"That your Honors will order and direct that said receivers, after paying the current expenses of operating and maintaining said railroads, and also paying for all labor, supplies, *rentals* and services aforesaid * * * apply the residue * * * to the discharge of all debts, obligations and liabilities of orator."

If this is not a prayer that the rentals he made a "preferential debt," it would be difficult to conceive of language in which such a prayer could be framed. A lessor could put no interpretation on it other than that. It was so understood by the court below. For forthwith an order was entered that "out of the income, *or otherwise*, all rentals accrued, or which may hereafter accrue upon all leased lines," be paid. (Record, p. 239, 240.) When appellant read this language, as well that of the prayer as of the resulting order, was it not warranted in assuming that its rentals would be paid by the receivers? And was not that

the fact of which it was "advised by the form of the bill and the prayer for relief?"

There is a sense, it is true, in which the receivers were appointed for the benefit of all parties, and not for that of the mortgagees alone. But this case does not by reason of that fact differ from other cases in which receivers are appointed. We understand the rule to be that receivers never are appointed in the interests of any particular party. Even where a mortgagee or a judgment creditor moves for the appointment of receivers to protect and manage the property in order that his debt may be secured, the receiver, nevertheless, represents all parties in interest, and holds the property for the benefit of the party who shall ultimately appear to be entitled to it. High states the doctrine in these words:

"The receiver being appointed for the benefit, not of the plaintiff alone, but of all parties in interest, and being an officer of the court, he is liable, etc."

High on Receivers, Sec. 270.

And the estate which he administers is liable on any covenant or agreement entered into by him. (Section 272.) When he adopts an agreement made by the party whose estate he is administering, as a lease, for example, the estate is liable on the agreement. (Sec. 273.) Whether or not he is an assignee, in the strict sense of that term, his act in adopting a lease held by the party whose estate he is administering, makes him liable on the same principle and to the same extent that an asignee of a lease is liable. (Sec. 273)

A recent text-book contains this language: —

"He is not the representative of a party or parties, but the representative of the court. Through and by him the court itself acts, exercising its authority for the corporation, its creditors and its stockholders."

Gluck & Becker, Rec. of Corp., Sec. 1.

So when a receiver is appointed to take charge of property which is in litigation, he holds it for the benefit of the party who may show himself ultimately entitled to it.

"The general duty of a receiver may be said to be to take possession of the estate and premises, or any other property, the subject-matter of dispute in the case, in the room or place of the owner thereof; and, under the sanction of the court, when necessary, to do all such acts of ownership, as the receipt of rents, compelling payment of them, management and letting the lands and houses, and otherwise making the property as productive *for the parties ultimately declared to be entitled thereto* as the owner could do if in possession."

Kerr on Receivers, p. 182.

That the receivers hold the property for the benefit of all parties in interest, the corporation itself, its creditors and those having contractual relations with it, is also held in

Ellis v. *Railroad Co.*, 107 Mass. 1, 17, 30.

Gl. & Beck. Receivers of Corp., p. 144.

Says Mr. Justice Brewer in the *Kneeland* case: —

"A court which appoints a receiver acquires by virtue of that appointment certain rights, and assumes certain obligations, and the expenses which the court creates in discharge of those obligations are burdens necessarily on the property taken possession of, *and this irrespective of the question who may be the ultimate owner, or who may have the preferred lien, or who may invoke the receivership.*"

Kneeland v. *Amer. Loan & Trust Co.*, 136 U. S. 98; L. Ed. Book 34, p. 383; 43 A. & E. R. Cas. 527.

It is evident, therefore, that the fact that the receivers hold for the benefit of all persons in interest, cannot change the status or prejudice the rights of any one, even though he may be also a party to the suit. Much less where he is not a party, or at most only a nominal party.

(*b*) In the paragraph from which we have quoted above (p. 219), the district judge continues;

"They (the lessors) were at liberty at any time after it (the bill) was filed to show, that the extension of the receivership over the leased lines was not necessary to the protection of the interests of the lessor companies, or that it was detrimental to such interests."

What occasion had the lessor to make such showing? We had been told as plainly as language could convey the information that our road would be operated by the receivers and our rents paid by them. There was nothing detrimental to our interests in this. The "detriment" we experienced was that the receivers disregarded the order to pay our rent.

The judge concludes the paragraph as follows: —

"If such showing had been made (and it appears to me that the lessor companies were cited into court to confess or deny the averments of the bill in that behalf) the leased lines would unquestionably have been released at any stage of the proceeding." (Record, p. 219.)

It might be pertinent to ask what averments of the bill we were called on to confess or deny. We were not disposed to deny that our leasehold was valuable to the system; nor that it was for the interest of creditors, secured and unsecured, that the system should be kept intact. We admitted the justice of the order that the receivers should pay the rent to become due us. If the prayer and the order were complied with, we were content.

But we trust that we shall not be deemed guilty of disrespect to the court below when we say that the last clause of the paragraph we have just quoted savors a little of an *ex post facto* condemnation. We are told that we could have had our property if we had wanted it, and that as we did not see fit to take it at once, we must bear the consequences. Yet the record conclusively establishes that the very purpose of the suit in which the receivers were appointed was to prevent us from getting possession of our road, and that no intimation was given us prior to April,

1885, either that we would lose our rental if we failed to re-enter on our property, or that our property would be surrendered to us if we asked for it. It strikes us that the intimation contained in the order of that date, that any lessor "might assert his rights," and that his right to insist upon possession "will be promptly recognized" (Record, p. 270), should not be held to convey information that if we had applied in May, 1884, for a surrender of our road, such request would have been granted.

(*c.*) In view of the emphasis given to this order of April, 1885, it is proper in this connection to review the circumstances leading to its promulgation, leaving the question of its effect for later consideration.

It appears from the record that the first step in this matter was taken in March, 1885, when counsel for the receivers appeared in court and proposed to cancel various leases, among them that of appellant. The conversation which then took place between counsel and the court conclusively shows that up to that time it was the accepted theory of all parties that the receivers had adopted the leases. The whole proceeding which resulted in the order now under review is based upon that idea. The receivers had adopted the leases, had assumed the payment of the rentals, and now the question was how to get rid of them. Speaking of appellant's lease, Treat, D. J., says (Record, p. 261):

"Now you wish to *cancel* the lease, do you, or hold the party *under the lease* and not comply with its terms?"

To which Mr. Blodgett, counsel for the receivers, replied:—

"This lease don't pay; and if the receivers were called on for an expression of opinion, I think they would advise that it would be wiser to *cancel the lease.*"

But the court, recognizing the fact that the obligation of a valid, legal contract could not be so easily thrown off by

a dissatisfied party to it, replies, speaking through the district judge:

"It is not advantageous to you, possibly, or to the holders of this general mortgage, that you do go on with it; *but what are we to do with the rights of these parties?* * * The lessor may come in and say, I wish you to *continue to do* what you contracted to do for my line and operate that road. You say you can not do it. Well, what will the lessor do,— *hold you to your contract or what?*"

Mr. Blodgett: "That is the matter that concerns us."

Treat, J.: "And it concerns the lessor equally." (Record, p. 262.)

On a subsequent page (264) the circuit judge, speaking of the proposition to cancel the lease, says:—

"Of course it involves two questions. *First*, whether the lease itself was a valid obligation and a charge upon the road prior to the mortgage; and if so, *second*, whether the lease proving valueless to the Wabash road, the lessor and the lessee can adjust and compromise *by a surrender of the lease upon satisfactory terms.*

Now, the receivers either repudiated or adopted the lease. If they had repudiated it, no question of a surrender could arise. It logically follows that they adopted it.

The learned judge further states in unmistakable language that the mere fact that the lease might be valueless would not warrant the court in cancelling it after it had once been adopted. "I do not think," he says, "that the court can say, we will cancel this lease because it is not profitable. A man has to stand many a contract he makes which is not profitable to himself. * * * We have no omnipotent parliamentary power in this matter that we can set aside anything which is not profitable to the Wabash." (Record, p. 263.)

So, too, both the judges who composed the court at that time recognized that the mortgagees had an interest in this road and that their consent was essential to a cancellation

of the lease, even if the receivers and the lessor should agree upon it. Says the District Judge:—

"Then, again, as already suggested by Judge Brewer, the general mortgage creditors may say, we do not wish to lose this leased road, and we are willing to stand the expense ourselves." (Record, p. 265.)

And on the same page the circuit judge adds:—

"The Wabash Company itself, represented by the receivers, of course is interested, because while to-day the operating expenses of that branch may be in excess of the receipts, to-morrow they may be the reverse. No order should be made without the consent or without the presence of the Wabash road itself, the lessee, in the court responding to that inquiry. The mortgagee under the general mortgage, the Central Trust Company, should be here responding to the inquiry, because as a mortgagee, it has a lien upon this branch, with all the possibility of earnings, whatever that may be." (*Ibid.*)

These extracts from the record establish the fact that whatever may be the effect of the order of April, 1885, upon appellant's right to subsequently accruing rent, that order precludes all parties to this proceeding from denying that the receivers adopted our lease. We will discuss the effect of this order as to subsequently accruing rent under a subsequent head of this argument.

(*d*) We have already adverted to the fact that one ground urged by counsel for appellees in the court below for rejecting the claim of appellant was that the latter was a party to the suit. This point seems to have had some weight also with the district judge, though his view of it differs somewhat from that taken by counsel. On page 219 of the record Judge Thayer says:

"Attention has also been called to the fact that the bill in this case was filed by the mortgagor against all persons and corporations, including the lessors, who were interested in the various roads forming complainant's railroad system.

As I understand the bill of complaint, the complainant professed to be acting, not alone in the interest of mortgagees, but in the interest of all the corporations whose roads had become an integral part of the system, whether by lease, consolidation or otherwise."

That the bill was not filed against appellant, and that appellant was not and could not legally be a party to the bill of the Wabash Company, we have already shown. But were the fact otherwise, how could that effect our rights? In what sense was the bill filed in our interest? Which of our rights was it intended to protect? It appears to us as an exeeedingly odd way of preserving our interests to allow a stranger to take and use, without compensation, property for which, up to that time, we were receiving rental. We shall be glad to have counsel for the respondents in this case explain in what way the receivership was to our advantage. We shall be glad to have them explain, if it was to our advantage, why we were not consulted, why notice was not given to us, why we were not allowed a voice in determining whether we would have our interests "secured and protected" in the way proposed.

The district judge adds that it was substantially represented by the bill "that the best interests of all parties concerned demanded the appointment of receivers of the whole system as the only feasible method of working out *the equities* appertaining to each." (Record, p. 219.)

We respectfully submit that we had no equities to be worked out. We stood upon our legal rights; we still stand upon them. The court, acting through its receivers, was, at the inception of the receivership, at liberty to repudiate our lease and we would have been powerless to prevent it; it had the right to adopt our lease, and we were equally powerless to prevent that. Had the receivers repudiated the lease, we would have been remitted to our legal right, viz; to take our road and operate it ourselves. Hav-

ing adopted the lease, we stand upon our legal rights to the rent provided in the lease.

It is intimated, rather than asserted in the opinions we are discussing, that appellent had the opportunity to express dissent if it were dissatisfied with the position in which it found itself. But, we respectfully ask, what good would it have done for us to have expressed dissent? The court, acting through its receivers, had the right to do just what it did. No dissent upon our part could have altered that right or put us or the receivers in any different position. Moreover, when did we have an opportunity to express dissent? Certainly not before the receivers were appointed; for they were appointed before appellant knew anything about it. Does any one suppose that if appellant had come in afterwards and filed an application to set aside the order making the appointment, the court below would have paid the slightest attention to such application? Would we not have been told to mind our own business, and leave such an application to *the parties in interest?*"

(*e*) But, it is said, the court made known to the various lessors that rent would not be paid to any line which did not earn a sufficient surplus to pay its rent. This point is perhaps most clearly expressed in the opinion of Judge Thayer. On page 221 of the record he says:—

"Among other things done for the protection of all parties to the litigation, at an early date it made an order to prevent the earnings of the numerous roads composing the system from becoming confused. It appears to me that such order, so far as it related to the leased lines, was a most explicit avowal that the court did not regard the rentals that from time to time accrued as an expense of administration, and that it did not regard the receivership as having been created for the benefit of the mortgagees or any particular class of creditors, but for the mutual advantage of all parties concerned, the lessor companies included."

While again expressing profound respect for the court, whose opinion we are discussing, we must say that it appears to us entirely aside from the question, whether or not the court regarded the receivership as having been created for the benefit of one class or another. The question, as it seems to us, is purely one of legal rights growing out of the course taken by the receivers. It is admitted more than once by both the judges composing the court below that where receivers do adopt a lease they then become by operation of law absolutely bound by the covenants of the lease. Now, we cannot see how the legal consequences of these acts can be averted, or their character changed, by any intention on the part of the court, one way or the other.

I do not wish to be understood as admitting that any order was ever brought to the knowledge of appellant which could be construed into an avowal, explicit or otherwise, that the court did not regard the rentals as an expense of administration. In the first place, we insist that even had appellant been properly and legally a party to the action, any order made as to some other defendant than ourselves, as to which we had no notice and on which we had no opportunity to be heard, would not be binding upon us. It is not enough that it be shown that an order made at some time, and with reference to some line, contained such an avowal. It must be shown that it was so made as to be specifically binding upon this appellant.

The court below places itself on record as holding this view. It expressly stated that it did not consider the lessors parties in any such sense that they were bound to take notice of the orders made in the case. In the proceedings preliminary to the order of April 16, 1885, Judge Brewer says that while in a certain general sense the branch roads and the parties interested are all parties to the proceedings

in this court as to the ordinary operations of the road, yet when any question is raised specifically affecting any leased line, it will be necessary to specially cite such line to appear and to give it an opportunity to be heard. (Record p. 263.) To this Judge Treat assented. Consequently, even if appellant had legally been made a party defendant to the bill by the Wabash Company, it would not have been bound to take cognizance of any proceeding in the case except where special notice had been served upon it and opportunity given it to be heard in that particular matter.

Now, the record before this court will be searched in vain for any order or ruling of the court below prior to April, 1885, which is susceptible of the construction that the earnings of the different lines were to be separately kept. In making this statement, we do not overlook the following clause of the order appointing the receivers:—

"That such receivers keep accounts as may be necessary to show the sources from which all such income and revenues shall be derived, with reference to the interest of all parties herein, and the expenditures by them made." (Record, p. 240.)

If it was intended by this clause to require the receivers to keep the accounts of each leased line and of each component part of the system separately, and to keep a separate account of the expenditures of each portion of the system, it was most unfortunately worded. We submit that such interpretation would not naturally be placed upon it. It would strike the average mind as simply meaning that the receivers were to so keep their accounts as to be able to state what portion of the income and revenue came from freight traffic, what from passenger traffic and what from other sources; and as to the expenditures they should be able to state how much was for maintenance of way, how much for transportation, how much for salaries and various

other classes of expenses. And it was so understood by appellant.

(*f*) Judge Thayer says (Record, p. 220): "The case, as I conceive, bears some analogy to the case of *Bridgewater Engineering Company* (12 Ch. Div., 181)."

The facts of that case were substantially these: The liquidator had expressly informed the landlord that he did not intend to occupy the premises so as to render the assets of the company liable for rent. When the time came at which he was to sell the plant situated on the premises, he notified the landlord of that fact, and suggested that the latter might wish to dispose of his lease at the same time, and that he might desire that the advertisement should state his willingness to grant a fresh lease to the purchaser. This met the view of the landlord, and the advertisement accordingly contained such notice. In the language of the Vice Chancellor, "the landlord was desirous that the plant and leasehold should be sold in one lot and to grant a new lease to the purchaser."

It was under this state of facts that the Vice Chancellor found that it was "a case of mixed accommodations to the landlord and tenant;" and it was this fact which caused the doubt in his mind whether the landlord was entitled to his rent. That his mind was by no means clear on the point appears from the fact that though he dismissed the landlord's motion for rent, he refused costs to the liquidator.

It is not easy to trace the resemblance between this case of the *Bridgewater Company* and the one at bar. In our case appellant was neither consulted, nor was it notified that the receivers would not adopt the lease and would not pay the rent. On the contrary, it was distinctly informed by the bills and cross-bills and by the order of the court below that the system was to be kept together; that the rentals would be paid; and that the paramount object in

view was to foreclose the entire Wabash property as one unbroken system.

(*g.*) While we have felt constrained to point out that the district judge was under a misapprehension as to some of the facts, and to question his interpretation of the allegations contained in the bill, we take pleasure in remarking that we are entirely in accord with him in his statement of the legal principle which governs the case at bar. On page 221 of the record he states it as follows:

"If the court ordered them to take possession of the same (that is, the leased lines) for the benefit of any particular interest or class of interests involved, and without any reference to the protection of the rights of the lessor companies themselves, then those interests for whose advantage the leased lines were taken and operated by the receivers should stand the expense of the rental and the court would be bound to so order. *The court has no more right than an individual to use one person's property for the exclusive benefit of another without paying for its use.*"

Inasmuch as the court did take possession of the leased lines without any intention, expressed or understood, to protect the interests of the lessors themselves, but solely for the benefit of the creditors of the Wabash Company; inasmuch as appellant was not a creditor of the Wabash Company, and was not one of those for whose interests the receivers were ordered to operate the line, it follows that those for whose advantage the leased lines were taken and operated, viz.: the creditors, secured and unsecured, should stand the expense of the rental. This is all we have ever claimed; but we have always claimed, and do here most strenuously urge, that our rent should be paid before one dollar goes to the benefit of any party who was a creditor of the Wabash Company when the receivers were appointed. We insist that the court below should have acted upon the principle announced by the district judge that it had "no

more right than an individual to use one person's property for the exclusive benefit of another without paying for its use." We also insist that the court should have acted on the view stated by the same judge on a previous page, where he declares that "it is also well settled that if mortgagees in a proceeding to foreclose a mortgage procure the appointment of receivers and cause them to take possession of property held in lease by the mortgagor, to which their mortgage does not extend, they thereby bind the mortgaged property for the payment of rent so long as the receiver remains in possession." (Record, p. 218.)

Can it make any difference whether the mortgagee itself initiates the proceeding, or approves of it and takes the benefit of it when initiated by some one else? Especially when one mortgagee has by a record entry assented to the order appointing the receivers and defining their duties, and the other mortgage has by a formal pleading admitted that the receivers had adopted the lease, without suggesting that such act was improper or improvident? And is not the case still stronger against the mortgagee if his mortgage does "extend" to the leasehold, than if it did not?

V. *Effect of the order of April, 1885.*

In the course of this argument, the order made by the court on April 16, 1885, has been frequently mentioned. It remains to discuss the effect of that order upon the question involved in this appeal. It was strenuously urged below by counsel for the receivers that, whatever appellant's rights might be as to rent accrued prior to the entry of that order, it had no ground to expect that subsequently accruing rent would be paid. And they point to the third paragraph of the order, which reads as follows:

"Where a subdivision earns no surplus, no rent or subdivisional interest will be paid." (Record, p. 270.)

We respectfully insist that this order cannot be held to change or prejudicially affect our then existing status. The liability on the part of the receivers grows out of the adoption by them of the lease. They stood, after they had taken possession of our property and commenced to operate it, in the same position as any assignee of a lease. The law cast upon them the same responsibility that had previously rested upon the lessee, and they became liable by privity of estate to perform all the covenants to which the lessee had been bound. There was only one way by which they could rid themselves of their liability, and that was by assigning over. A sale under decree of foreclosure and a deed to the purchasers would have had that effect. So, we suppose, would an order by the court to return the property to the original lessee. But nothing short of an assignment of some kind, accompanied by delivery of possession, would have put an end to the liability which rested upon them by virtue of the privity of estate between them and appellant. This is so elementary a principle in the law pertaining to the assignment of leases, it is not necessary to cite authorities in support of it. What the receivers could not do, the court could not do, since the receivers were in fact only the arm of the court. Their position was the court's position. The obligation which devolved upon them as assignees of the lease, was in fact an obligation which devolved upon the court. A statement, therefore, by the court, that it would not continue to be liable as assignee of the lease would have no more force than a statement to that effect by the receivers.

As we have stated, in the beginning appellant's position was a purely passive one. It had no right to act; it had no right to object to any action. But when the lease was once adopted, then the rights of appellant became fixed,

and neither the court nor the receivers had any power to alter those rights.

We are by no means willing to admit that our lease was a disadvantageous one or that the operation of our road was a burden to the system as a whole, But if such fact were admitted, or were proved beyoud a doubt, its legal effect would not be to confer upon the court a right to repudiate the lease which it had adopted. If such were the result, if it be the rule that a receiver may repudiate a lease after adopting it, because he finds it to be less advantageous than he had anticipated, we should expect a clear annunciation of the doctrine in some adjudicated cases. We venture to say that neither in England nor America can any case be found in which such a rule has been directly declared. One of the earliest cases involving the question is *Turner* v. *Richardson* (7 East. 335), which holds that the lease cannot be requdiated. Says the court of King's Bench in that case:

"If they made their election to take the lease they can not afterwards renounce it because it turns out to be a bad bargain."

Lord Elenborough held in *Hanson* v. *Stevenson* (1 B. & A. 303) that assignees must make their election promptly, and having once made it, *they must abide by their decision.*

In *Dorrance* v. *Jones* (27 Ala., 633) it is said that "when once the election was made, *the assignee could not recede from it.*"

In other cases the rule is declared to be that if a receiver or assignee elects to take the term, he takes it *cum onere.*

Dixon v. *Smith*, I Swanst., 457;

Martin v. *Black*, 9 Paige, 641.

It was urged in the argument below that the *Woodruff* case (93 N. Y. 609) was an authority to the effect that the court could at any time order the receiver to surrender the lease, even though he formally adopted it. But that por-

tion of the opinion which touches this question is purely *obiter*. The case involved no question of surrender. The *dictum* is at variance with all the authorities, whether text-writers or courts.

The case of *New Jersey & New York Railway Company* (29 N. J. Eq., 67) is not in point. There both companies were insolvent, both were in the hands of receivers and both receivers had been appointed by the court which was called upon to determine the question at issue between them. The court rests its decision upon this ground—that it was sitting as a court of equity, administering two trusts; that the question was one to be decided on equitable grounds; that it would determine the matter so that neither trust should obtain any advantage over the other, and without any regard to the legal rights of either under the contract.

But we are not here asking for the adjustment of equities. Our claim is for our legal rights. It is a claim which, if sued on in any other court than the one which appointed the receivers, would have been triable by a jury. If our claim is denied it will be in violation of the very principle laid down by Chancellor Runyon in the above case. "The court, of course," he says, "*will not take the property of one railroad company for the benefit of another.*" (p. 69.)

The argument on this point has so far proceeded on the theory that the court below attempted to surrender our lease. But this does not accurately state the case. What it, in fact, undertook to do was, without negotiating with us for new terms, to hold on to the property and operate it without paying rent for it. It said to appellant, we will not pay you rent, notwithstanding the contract of the lease. You may take your road if you want it. But though you may be now unprepared to take it; though it may require months before you will be in a condition to take it, never-

theless, our receivers, though they continue to operate it, will pay no compensation. At a time when the law gave us no option, but did give one to the receivers, the latter exercised it by assuming the lease. When they became tired of their bargain, the court said to us, now you shall exercise an option to resume your road, or submit to the alternative of its being operated by the receivers without compensation.

It must be borne in mind that this was said without warning to us. Only a few days' notice was given appellant that the matter was to be considered. The hearing was had on April 13th, and the order made April 16th. (Record, p. 267, 268) For nearly a year prior to that date the receivers had been operating our road, and no intimation had come to us from the court that they would not continue to operate it. It could not be expected that we would be prepared at a moment's notice to take possession. Yet, the court positively declared that it would not pay rent, however long it might continue to operate the road. We confess that we cannot see any theory of law or equity which would justfy the court in withholding rent while it continued to hold possession. Nor do we see how appellant's willingness or ability to resume possession can effect the question.

If it be conceded that a receiver ever has the right to surrender a lease once adopted, the time to have made the surrender was when appellant first filed its intervening petition. By continuing to operate the road after that time they expressed their unequivocal intention not to surrender.

It is plain from the action of the court below that its judges did not entertain the idea that the liability of the receivers was in any manner altered by the order of April, 1885. If they had so construed it they would have directed that our rental should be paid to that date. But the fact is

they denied our claim for rent accruing prior to that order equally with that which accrued afterwards. And they rejected our claim as a whole, on grounds which had nothing to do with the order in question.

In this connection, we again advert to the language of the circuit judge in the discussion which took place when the matter was first called up. He said that one of the questions to be determined was whether "the lessor and the lessee can *adjust and compromise* by a surrender of the lease upon satisfactory terms." (Record, p. 264.) Clearly the learned judge would not have used this language if he supposed the receivers could rid themselves of the obligation of the lease without the consent of the lessor.

There would seem to be another ground upon which it should be held that this order did not affect our right to rents accruing after its date. The order is expressly based upon the theory that each specific portion of an entire system is entitled to the amount payable to it under the contract by which it became a part of the system, only in case such specific portion earns enough to pay such amount. A sufficient answer to this proposition is that it is impossible to tell how much any given portion of a railroad earns in dollars and cents. It might be that in a road a thousand miles long there was a portion covering a half dozen miles which was originally laid over a bog or a quicksand, which by reason of such insecure foundation would cost in repairs many times more than the actual *pro rata* receipts from the number of miles embraced in it. Yet it would be extremely unfair, if that small portion of the road belonged to another company and was held under a lease, that no rental should be paid to it because of the circumstance referred to.

Appellant's condition is quite parallel with the one supposed. The master found that, owing to previous failure

to repair, the receivers were compelled to make large and extraordinary outlays, and that the gross earnings of appellant's road were decreased and diminished by reason of the previous failure to put the road in proper condition. (Record, p. 42.) It appears therefore, that appellant suffered from this failure of its lessee at both ends. The expenditures were much greater, the receipts were much less, than had the road been in good order. Yet the court below held that, inasmuch as by reason of this condition of things the expenditures were in excess of the receipts, we have forfeited all right to the rental provided in the lease.

Nor is it true that any other line or branch, whether it has become a part of the consolidated system by purchase, by lease, or otherwise, has any claim as against this income which is superior to that of appellant. The mere fact that on one part of this vast system the receipts from local traffic, together with the share of through traffic receipts, happen to exceed the amount of money used in operating that particular part of the system, or that expenses happen to be less on some specified number of miles of road in one locality than in another, presents no valid reason why the money earned on such particular section of the line should be used for the exclusive benefit of that section. All receipts became a part of the general income. They all went into the hands of the receivers, and were derived from the operation of the system as a whole. No principle, legal or equitable, will justify their sequestration for the payment in full of certain demands or expenses, while others are left totally unpaid. To quote again from the opinion in *Woodruff* v. *Railway Company* (*ubi supra*):

"It would seem to be entirely immaterial as to the source whence the funds in the hands of the receiver were derived, or whether the particular portion of such road, covered by mortgages, contributed more largely to such fund than

other portions not subject to such liens. Under the orders in question, the receipts, from whatever source derived, were to form one common fund, applicable in the first instance to the discharge of the obligations which the receiver was thereby authorized to incur." (p. 623).

And the Court adds:—

"It seems to us, however, that it does not necessarily follow that the value of any specified portion of an extensive railroad system can be measured with exactness by the amount of the receipts of such particular portion. Its value as a feeder or connecting link in such a system may be largely disproportioned to the actual sum received for transportation over it. Such considerations, *influential as they might be in affecting the action of parties in negotiating a contract for the use of a railroad*, would preclude a court from holding that the actual receipts of a road thus situated, constituted an equitable basis for fixing the compensation to be paid for its use" (p. 624).

It will be borne in mind that appellant's lease is one of the oldest leases in the system; that its line became a part of the Missouri road long before the present consolidated system was constructed; that it antedates the general mortgage and the Iron Mountain mortgage. While the St. Louis, Kansas City and Northern Railway Company was the lessee, appellant had a contract with a solvent party, abundantly able to pay its rent and keep its road in proper condition. That lessee is to-day in a solvent condition, and as the record shows, has always been able to pay its fixed charges, the interest on all its bonds, and our rental. After the consolidation, however, the new system began to add other lines, to acquire other roads by purchase or otherwise, until it became so weakened by its unprofitable branches that insolvency ensued. Why should we be compelled to suffer the consequences of this improvident reaching out and grasping other lines? Why should we be denied the right to our rent because this vast conglomeration of roads has so many weak points that all cannot be paid in full out of the income?

One other point must not be overlooked: the receivers by adopting the lease, became bound by all its covenants. Their obligation to repair was equally binding with that to pay rent. They cannot, therefore, set up their outlay for repairs as a defense to our claim for rent.

VI. Appellant is entitled to the entire amount of rental claimed in the court below.

1. The receivers took possession in the middle of a half year. The rent became due September 1, 1884, March 1, 1885, September 1, 1885, March 1, 1886, and April 24, 1886, the date of the surrender. Thus all these installments accrued while the receivers were in possession. It is unnecessary to cite authorities to show that an assignee of a lease is liable for the rent accruing while he is in possession.

The small balance remaining over from the half-year ending March 1, 1884, is properly a part of the rent accruing due September 1, 1884. This seems to be the only reasonable or practicable construction of the lease [see record, p. 14, 3d paragraph]; and such was the construction put upon it by the parties as manifested by their course of dealing. It should be paid, too, on the principle laid down by Mr. Justice Harlan in *Thomas* v. *Railroad Co.*, 36 A. & E. R. Cas. 393.

2. The rent to which we are entitled is that fixed by the lease, viz.: thirty per cent. of the gross earnings of the road. This necessarily follows from the principles to which I have already adverted. The receivers are holden for rent because they became assignees of the lease. An assignee of a lease, during the time that he holds as such, is liable

on the covenants of the lease to the full extent that the original lessee was holden. To this proposition we cite, in addition to those collated on pages *ante*, the following authorities:—

1 Smith's Lead. Cas. (7th Am. Ed.) 227;
Stewart v. *Railroad Co.*, 102 N. Y. 601;
Smith v. *Brinker*, 17 Mo. 148;
Willi v. *Dryden*, 52 Mo., 319;
Blake v. *Sanderson*, 1 Gray, 323, 325;
Easton v. *H. & T. C. Ry. Co.*, 38 Fed. Rep. 784.

We do not understand that this court has ever made an exception to this rule. There are cases, we admit, in which the court speaks of a fair and reasonable rental being allowed for the use of property operated by receivers. But we know of no direct decision that a lessor, whose lease has been adopted by receivers, is not entitled to the full rent reserved in the lease. There are cases, to which we shall in a moment refer, in which the lessor did receive rent on the bases of a *quantum meruit*. But in none of these cases was it decided that, where receivers take possession of a leasehold, valid as to the party whose estate they are administering, they may escape payment of the full rent reserved by its terms.

If the fact that the value of the leasehold is not equivalant to the reserved rent furnishes a ground for reducing the rent after the leased property passes into the possession of a receiver, the same principle would require that the rent should be increased in case the amount reserved in the lease were less than its reasonable and fair value. Yet we apprehend no court would allow any greater sum than the rent reserved. This shows the fallacy of the argument that the receivers ought to be held only for the actual value of the leasehold to the system.

It is true that in the case of *Miltenberger* v. *Railroad Co.* (106 U. S. 286) the fact is mentioned that the rental

allowed was not based upon the lease, but upon a fair rental value. This cannot be held, however, as committing this court to the rule that rent can only be allowed on a *quantum meruit*, and not on the covenant of the lease. If such were its position, the ruling of this court would be in direct conflict with that of all other courts which have passed on the question. The fact is, in the *Miltenberger* case the trial court, for some reason not disclosed by the record, took that position and the lessor made no complaint. The lessor was not before this court by appeal, being satisfied with the amount allowed.

It must be borne in mind, too, that in our case there was not a particle of evidence produced before the Master that thirty per cent. of the gross earnings would be an excessive rental for our road, as based upon what other roads of the same character would rent for.

It is said in the *Kneeland* case that the rental should not be "based upon the use actually made by the receiver, but on the ordidary value of the rental of such property * * * what in the first instance, and before the use had been had, would be adjudged a reasonable rental value." (136 U. S. 103.) On this basis who can say that thirty per cent. of the earnngs is not a reasonable rental?

But this *Kneeland* case cannot be considered an authority in support of the *quantum meruit* theory. What was there called a rental was in realty only an installment of the purchase money, and its amount bore no relation whatever to the actual rental value of the rolling stock. It became necessary, therefore, to fix a rental value. That is all that this court means in what is said on page 103 of the opinion.

In the case of the *St. Louis, A. & T. H. R. R. Company* v. *C. C. C. & I. Railroad Company* (125 U. S. 658; L. Ed. Book 31, p. 832; 33 A. & E. R. Cas. 16), Mr. Justice Mathews says that the lessor is entitled to a

fair and just compensation for the use of its road upon a *quantum meruit*. But that was because the lease had been declared void. It will, nevertheless, be noticed that the rental was allowed upon the basis of the sum fixed in the lease. That case comes far short of being an authority that a valid lease may be set aside and the recovery of the lessor limited to a *quantum meruit*.

The decision in the *Oak Pits Colliery Company's case* shows that in the opinion of Lord Justice Lindley, the value of the leasehold cannot be considered by way of reduction of the rental, since he held there that the lessor was entitled to the full rent, though he could not have realized so much from a distress. (L. R. 21 Ch. Div. 322.)

RESUME.

To sum up the points made in this argument, we urge

1. That the receivers adopted appellant's lease, and became bound by all its covenants.

2. That the receivers of railroad property stand in no different position, as to their rights, duties and liabilities, and are governed by no different rules from those administering property of any other character.

3. That appellant was not a party to the suit instituted by the Wabash, St. Louis & Pacific Railway Company, and if it had been, such fact would in no way alter or affect the relation in which it stood to the receivers.

4. That the receivership was in no sense for the benefit of appellant, and that its claim for rent is superior to the rights of the mortgagees, not only against the income, but against the corpus.

5. That appellant's right to rent was not altered, or in anyway affected, by the Circuit court's order of April 16, 1885.

6. That appellant is entitled to the full amount of rent covenanted for in the lease, and that the amount due it should not be computed on the basis of a *quantum meruit*.

We respectfully submit that under the decisions of this court, and the settled principles governiug the conduct of receivers appointed to take charge of property pending litigation, the decree of the court below dismissing appellant's intervening petitions should be reversed, and that an order should be entered that the entire sum which has accrued in rent be paid to appellant.

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Office Supreme Court U.S.
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No. 287.

THE ST. JOSEPH AND ST. LOUIS RAILROAD COMPANY, APPELLANT.

vs.

SOLON HUMPHREYS AND THOMAS E. TUTT, RECEIVERS OF THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT AND BRIEF OF APPELLEES.

WELLS H. BLODGETT,
Attorney.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1890.

THE ST. JOSEPH & ST. LOUIS RAILROAD COMPANY.
vs.
SOLON HUMPHREYS AND THOMAS E. TUTT, RECEIVERS OF THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY ET AL. } No. 287.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

STATEMENT.

The following are the material facts in this case:

First. Prior to 1874 the St. Joseph & St. Louis Railroad Company owned a line of railroad about 72 miles in length, extending from St. Joseph, Mo., to North Lexington, in said State, and on the first day of June, 1874, said company leased its road to the St. Louis, Kansas City & Northern Railway Company for a term of 99 years. The lessee company agreed to pay to the

St. Joseph Company on the first days of March and September in each year, as a rental, thirty per cent of the gross earnings of said line, and it also guaranteed that such percentage should not in any one year be less than twenty thousand dollars. The lessee company also agreed to pay all taxes and put the road in good running order and afterwards keep it in good condition during the whole of said term. The lease (Record, page 16) also contained the following provision:

"But in case default shall be made in the payment of the rents reserved and the same, or any part thereof, shall remain unpaid *for a space of thirty days* from and after the day when the same shall become due and payable, or if said lessee shall fail to comply with the covenants to pay taxes, or in all things to keep and observe all and every the covenants, stipulations and agreements herein contained and on its part to be observed and kept, then it shall be lawful for said party of the first part to enter upon and take possession of all the property hereby leased, together with all the improvements thereon constructed and to have again, repossess and enjoy the same as in the first instance, and upon such default in the payment of rent or taxes, or the breach of any of the covenants aforesaid, said lease shall cease, terminate and be forfeited at the option of said first party."

Second. Under that lease the St. Louis, Kansas City & Northern Railway Company took possession of the leased line and operated it until November, 1879, at which time the St. Louis, Kansas City & Northern Railway Company, a corporation of Missouri, was consolidated with the Wabash Railway Company, a corporation

of Illinois, Indiana and Ohio, the consolidated company taking the name of "The Wabash, St. Louis & Pacific Railway Company."

Third. On the first day of June, 1880 (Record, page 237), the Wabash, St. Louis & Pacific Railway Company executed to the Central Trust Company, of New York, and James Cheney, a mortgage known as its "general mortgage," to secure what were known as its general mortgage bonds, of which seventeen million dollars were issued. That mortgage covered some thirty-six hundred miles of railroad and embraced all the lines then owned by or leased to the Wabash Company.

Fourth. The Wabash, St. Louis & Pacific Railway Company continued the operation of all its lines, including the St. Joseph and St. Louis Road, until May, 1884, when it (the Wabash Company) became insolvant, and on the 27th day of May, 1884, it filed in the Circuit Court of the United States for the Eastern District of Missouri, its bill of complaint, in which it prayed for the appointment of receivers to take possession of and operate for the benefit of all its creditors, all its lines of railroad. The defendants in the bill included the St. Joseph and St. Louis Railroad Company, as well as all other lessor companies and trustees in all the mortgages resting upon the whole or any part of the Wabash Line. Among other allegations contained in the bill were the following:

"Your orator further showeth that by reason of the failure of the crops aforesaid and the enormous expenses

imposed upon orator by the recurrence of extreme freshets, as aforesaid, and by reason of the cost of completing its lines, as aforesaid, a large floating debt has accumulated against your orator, amounting in the aggregate to about the sum of $4,784,145.01."

* * * *

"Your orator would further show that by the terms of nearly all, if not quite all, the mortgages and trust deeds aforesaid, whether executed by orator or by other companies on any portions of said lines prior to the time when orator acquired the same, there was not only embraced the roads and tangible property of the companies executing said instruments, but also the revenues and incomes to be derived from the use of the parts of said roads so mortgaged, and the holders of the bonds secured by said mortgages have always insisted upon their rights to look to the revenues of the sections of the road upon which the mortgages rested as a means of paying and discharging said bonds. That all or nearly all of said mortgages embraced all rolling stock to be thereafter acquired by the company executing such mortgages, but as such original companies and those lines of railroad have been gradually absorbed in orator's vast system, the rolling stock on said entire system has become so intermingled as to be incapable of division according to the original ownership of the said several lines of road, or according to said several mortgages, and any attempt to control or dispose of portions of such rolling stock by any court or courts not having jurisdiction of the whole, and not competent to deal with orator's entire property as a unit, would produce great confusion and uncertainty, and would result in great loss to all persons interested in said rolling stock or in orator's property or securities.

Further complaining, your orator would show to your Honors that the directors and officers of your orator's company have thoroughly considered and already resorted to all proper means for obtaining the means with which to pay the floating indebtedness of said company,

and also to meet the large amounts of accruing interest which will fall due at the beginning of the month of June next, and continue to mature by installments at very short intervals; but, may it please your Honors, so it is that said officers and directors have hitherto wholly failed to provide the means with which to discharge said floating indebtedness and to meet said accruing interest. That your orator is powerless now to accomplish such purpose, and for the time being, at least, is practically insolvent; that in spite of all the exertions of orator and its officers, it is now certain that a default in the payment of interest maturing in June next will occur, and that orator will also be without means of meeting its floating indebtedness. * * * * * *

And orator avers that the interest of orator in said road, and of all its creditors and holders of the bonds aforesaid, are greatly imperiled by the existing prospect of the disruption of said road on the happening of the default impending as aforesaid, and the interest of all parties can only be protected by the interposition of a court of chancery; that if said lines of railroad are broken up, as aforesaid, and the fragments thereof placed in the hands of various receivers, and the rolling stock, materials and supplies seized and scattered abroad in the manner above indicated, the result will produce irreparable injury and damage, not merely to orator, but to all persons having any interest in said lines of road and the securities thereof. * * * * * *

And your orator further showeth unto your Honors that your orator and its Board of Directors, conceiving that it was their duty to protect said property and to treat the same as a trust fund for the security first of its creditors and then of orator's stockholders, have determined to appeal to your Honors sitting in chancery, to take possession of said lines of road through the instrumentality of one or more receivers, and thereby to prevent the breaking up of said lines of road and the scattering abroad of its assets in the manner above indicated. * * * * *

Inasmuch as orator has not an adequate remedy at law in the premises, it prays your Honors to take cognizance of this bill of complaint; that in order to the preservation of the interests of large numbers of persons, stockholders and creditors unknown to orator, and in order to the protection of the interests of all concerned, and to prevent a great multiplicity of suits, your Honors will appoint one or more receivers, and empower and direct such receiver or receivers to take possession of said entire property, and to preserve, operate and manage and control the same, collect all indebtedness due or to become due to orator, and otherwise to discharge all the duties ordinarily imposed by courts of equity on the receivers of railroad property by such courts appointed. * * * * *

That your Honors will order and direct said receivers, after paying the current expenses of operating and maintaining said railroads, and also paying for all labor, supplies, rentals and services, aforesaid, * * * * * * to apply the residue or surplus of all incomes, revenues and earnings of said railroads, and all other assets coming into their hands as such receivers to the discharge of all debts, obligations and liabilities of orator, according to the rights and legal and equitable priorities of all concerned as creditors or otherwise, under the direction of the Court. * * * *

And orator prays your Honors to make such order in the premises as will insure the protection of the interests of orator and its creditors, giving an opportunity to all the defendants not served with notice to be heard hereafter; and orator avers that no injury can arise to any creditor or person in interest from the appointment of the said receivers with or without notice, as such receivers' possession will inure to the benefit of all the persons concerned."

Fifth. On the foregoing bill of complaint, and without consent of or objections from any of the defendants in the bill, the Court, on the 27th day of May, 1874, ap-

pointed Solon Humphreys and Thomas E. Tutt receivers, and directed them to take possession of and operate all said railroads, and from the incomes thereof pay all their current expenses, all just claims and accounts for labor, supplies, professional services and salaries of officers and employes that had been earned or that had matured within six months prior to the making of said order, and all balances due to other railroad or transportation companies growing out of the exchange of traffic during the preceding six months. The order also contained clauses as follows:

"That said receivers also in like manner pay all rents accrued or which may accrue upon all leased lines of said complainant, and for the use of all terminal or track facilities, and all such rentals or installments as may fall due from said complainant for the use of any portion of road or roads, or terminal facilities of any other company or companies, and also for all rentals due or to become due upon rolling stock heretofore sold to complainant and partially paid for. * * * *

That said receivers keep such accounts as may be necessary to show the source from which all such incomes and revenues shall be derived, with reference to the interests of all parties herein and the expenditures by them made."

Sixth. Under the latter clause of the foregoing order the receivers kept separate accounts of the earnings and expenses of the various lines and divisions of the Wabash System. There is no dispute here concerning the gross earnings of the line from St. Joseph to North Lexington, nor is there any question concerning its operating expenses. The methods by which the operating expenses of the lines were ascertained by the receiv-

ers are shown in detail by Exhibit No. 100 (Record, page 178). It is also shown by Exhibit No. 102 (Record, page 186) that from May 29th, the day on which the receivers were appointed, to July 1, 1885, the operating expenses of the St. Joseph line exceeded its gross earnings by the sum of $71,207.36. And it was found by the master, under a stipulation of the parties (Record, page 206–7) that from March 1, 1885, to April 24, 1886, the expenses of the line exceeded its gross earnings by the sum of $29,492.25.

Seventh. On the 26th day of June, 1884, the receivers asked instructions from the Court concerning the payment of interest on certain bonds secured by mortgages on the different lines and divisions of the Wabash System, and as to how they should keep the accounts of the earnings and expenses of certain leased lines, but there was no mention of the St. Joseph & St. Louis Line in that petition, or in the order of the Court entered thereon. As there seems to be some misapprehension on the part of counsel for appellant with respect to the purport of those proceedings, we invite the attention of the Court to the record itself.

Eighth. The record shows that in October, 1884, the receivers asked the Court for instructions with respect to the payment of interest or rental on a certain other branch line of the Wabash System, known as the "Havana Division," and in disposing of that application the Court, among other things (Record, page 277) then said :

"I stated at an early day, and Judge Brewer has gone over that matter (and we are in accord with regard to it), that I am not going to take the money that belongs to the underlying mortgages to pay interest on non-earning branches. If they have got to fail they must fail. I will protect the underlying mortgages especially, and they have not got enough here to do it. * * * * * If this branch is earning enough to pay its own interest, that is another inquiry. But certainly I am not going to sit here and order that the earnings that belong to other branches in the consolidated system shall be taken to pay concerns that do not earn running expenses. Let them collapse."

Ninth. The record shows (page 261) that on the 20th day of March, 1885, the receivers applied to the Court for instructions with respect to the cancellation of the the St. Joseph & St. Louis lease. The record shows that the following among other proceedings, were then had:

"IN THE MATTER OF THE CANCELLATION OF CERTAIN LEASES OF BRANCH RAILROADS, PARTICULARLY THE ST. JOSEPH & ST. LOUIS RAILROAD.

(After remarks of counsel, Mr. Blodgett for receivers.)

The Court (Treat, J.): The rental has not been paid?

Mr. Blodgett: No, sir.

The Court: And the lessors are parties to this proceeding?

Mr. Blodgett: Yes.

The Court: Have they ever appeared?

Mr. Blodgett: Only one company has appeared and demanded its rental, the St. Joseph & St. Louis Company.

The Court: You have not paid it?

Mr. Blodgett: We have not paid it.

The Court: And they chose to rest in that condition?

Mr. Blodgett: Yes, and are unwilling to take their property.

The Court: Now you wish to cancel the lease, do you, or hold the property under the lease and not comply with its terms?

Mr. Blodgett: This lease don't pay; and if the receivers were called on for an expression of an opinion I think they would advise that it would be wiser to cancel the lease.

The Court: Wouldn't you have to cite them in for that purpose?

Mr. Blodgett: The suggestion was that the parties should be required to appear and show cause why we should not either be permitted to cease the operation of these lines, or let them be operated at their own expense."

Tenth. Afterwards, in the month of March, 1885, (Record, page 267) the receivers notified the St. Joseph & St. Louis Railroad Company that they would, on the 13th day of April, 1884, apply to the Court for instructions concerning the cancellation of their lease and a surrender of their line to whomsoever the Court might direct. Said notice was in terms as follows:

"NOTICE OF HEARING OF MOTION.

In the Circuit Court of the United States for the Eastern District of Missouri.

THE CENTRAL TRUST COMPANY of New York, et al., Complainants, *vs.* THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, et. al., Defendants.	Consolidated cause. In Chancery.

To the St. Joseph & St. Louis Railroad Company:

Please take notice that on the 20th day of March, 1885, the undersigned receivers in said cause filed in said court

their report, showing that for the period commencing May 29th, and ending November 30, 1884, the earnings of said St. Joseph & St. Louis Railroad were as follows:

Gross earnings	$83,644.27	
Other credits	636.91	
		$84,281.18
Operating expenses	$130,766.60	
Other debits, including six months' taxes	4,694.67	
Proportion of car-trust interest	938.74	
Rental (30 per cent gross earning)	25,093.26	
		161,493.27
Deficit		$77,212.09

The expenses of the line (not including any charge for rental) have therefore exceeded its earnings $52,118.83.

You are further notified that on Monday, the 13th day of April, 1885, or as soon thereafter as we can be heard, we will apply to said Court for instructions concerning a cancellation of the lease entered into on or about the 1st day of June, 1874, between the St. Joseph & St. Louis Railroad Company, of the first part, and the St. Louis, Kansas City & Northern Railway Company, of the second part, and a surrender by us of said leased property to whomsoever the court may direct, and for such other and further orders with respect thereto as the facts may require in justice to all the parties concerned.

SOLON HUMPHREYS,
THOMAS E. TUTT, } *Receivers.*"

Eleventh. On the 16th day of April, 1885, after the application of the receivers for instructions concerning

the cancellation of said lease had been duly presented, the Court delivered an opinion, which it directed should stand as an order, in which it (Record, page 270) said:

"3rd. Where a sub-division earns no surplus—simply pays operating expenses—no rent or sub-divisional interest will be paid. If the lessor or sub-divisional mortgagee desires possession or foreclosure he may proceed at once to assert his rights. While the Court will continue to operate such sub division until some application be made, yet the right of a lessor or mortgagee whose rent or interest is unpaid to insist upon possession or foreclosure will be promptly recognized.

That, it is true, may work a disruption of the system, as evidenced by the movement just made in respect to this Cairo Division, but the proceeding for disruption will come from the sub-divisions. The Court is not sloughing off branches—tearing the system in two—but the disruption, if it comes, will come from those who seek separation and have legal right to so do.

4th. Where a sub-division not only earns no surplus but fails to pay operating expenses, as in the St. Joseph & St. Louis Branch, the operation of the sub-division will be continued, but the extent of that operation will be reduced with an unsparing, though a discriminating, hand—that is, if a sub-division does not earn operating expenses and the receivers are running two trains a day, then lop one of them off. If they are running one train a day and still it does not pay, then run one train in two days. While the Court will endeavor to keep that sub-division in operation, it will be made the burden of it to the consolidated corporation, and to all the other interests put into that consolidated corporation a minimum. We have used the term 'with an unsparing, but a discriminating, hand.' By this we mean that certain things must be left to the discretion of the receivers. It may be that running one mixed train, proffering slight accommodation to the traveling public, would work a greater deficit than two trains, one furnishing the conveniences of

a passenger train and the other purely a freight train. That must be left to the discretion of the receivers. The Court is not in a position to determine as to what in any particular case will be the most likely to work out a minimum deficit. If there is any controversy hereafter arising under the management of the receivers respecting any reduction, why, all the parties interested can apply to the Court."

Twelfth. About one year after the foregoing order had been entered, to wit, on the 9th day of April, 1886, the St. Joseph & St. Louis Railroad Company applied to the Court for possession of its road, and thereupon the Court at its instance made an order (Record, page 198) terminating said lease, and directing the receivers to surrender the road to said company on the 29th day of April, 1886, which order was duly complied with.

Thirteenth. The record shows (page 241) that on the 9th day of June, 1884, the Central Trust Company of New York and James Cheney, trustees in the general mortgage, filed in the Circuit Court of the United States, for the Eastern District of Missouri, their cross-bill against the Wabash, St. Louis & Pacific Railway Company, in which they prayed for the foreclosure of said general mortgage, and that pending their suit receivers be appointed to operate the mortgaged property.

Fourteenth. On the 14th day of October, 1884, (Record, page 260) the Central Trust Company of New York and James Cheney, trustees in said general mortgage, filed in said court an amended cross-bill against the Wabash,

St. Louis & Pacific Railway Company, in which they prayed for substantially the same relief asked in their original cross-bill of June 9, 1884.

Fifteenth. And again on January 13, 1885 (Record, page 260), the Central Trust Company of New York and James Cheney, trustees in said general mortgage, filed in the Circuit Court of the City of St. Louis (a State court) an original bill of complaint against the Wabash, St. Louis & Pacific Railway Company, in which they stated substantially the same facts and prayed for substantially the same relief asked in their cross bills. The original bill filed by said trustees in the State Court was immediately removed into the Circuit Court of the United States for the Eastern District of Missouri, and on June 10, 1885, it was consolidated with the original suit in which the receivers had been appointed.

Sixteenth. On the 16th day of April, 1885, the Central Trust Company and Cheney having moved the Court to appoint receivers under their cross-bill, the Court (Record, pages 271-2) then said:

"The value of any branch abandoned is diminished, and the Court may not consider simply the interests of the consolidated company, the mortgagor, and the trust company, the mortgagee. It is bound to regard the interests of each one of these sub-divisions that went into the consolidated company, and thus into the receivers' hands; and if the Court may and ought to issue receivers' certificates in order to keep a single line a going concern, so, having possession of this system, with its various branches, for the same reason and by the same means, it should keep each one of them in operation.

* * * * * *

So I can not see what can be gained as a legal proposition by a new order of appointment extending the receivership, as counsel say, to the trust company, the mortgagee. The receivers will have no greater power, no different power, would owe no different duty and would be no more and no less subject to the orders of this Court than they are now, and certain they would have no right in the operation of their trust to extend favors to the one side or the other.

Furthermore, as receivers, appointed at the instance of the mortgagor, in the first instance, they took possession of the entire properties, while this order, as tendered, contemplates a seizure of a part only of these properties—not all. Having taken possession of the road under the idea, in the first instance, that the integrity of the system had a value and should be preserved, it seems to us the receivership should continue right along in that line. There will be no reappointment of the receivers."

THE INTERVENING PETITION.

On the foregoing facts the St. Joseph & St. Louis Railroad Company, on the 25th day of November, 1884, filed the intervening petition on which the case was heard in the court below. The petition set out the execution and terms of the lease made in 1884 by it to the St. Louis, Kansas City & Northern Railway Company, the consolidation of the latter company with the Wabash Railway Company, and the appointment of the receivers. The petition then alleged that the receivers took possession of the St. Joseph & St. Louis Road on May 29th, 1884, and adopted said lease. In that connection the petition (Record, page 9) contained the following:

"Your petitioner further shows to your Honors that Solon Humphreys and Thomas E. Tutt, who were appointed by your Honors, in accordance with the prayer of complaint herein, receivers of said Wabash, St. Louis & Pacific Railway Company, took possession of said road as such receivers on the 29th day of May, 1884, and that on said day said receivers also took possession of the road, property, rights, franchises, etc., of your petitioner, which had been demised as aforesaid, and which were at the date of the appointment of said receivers in the possession of and held and operated by said Wabash, St. Louis & Pacific Railway Company, and said receivers have ever since said 29th day of May, 1884, held, used and operated your petitioner's said road and other property in and by said lease demised, and under and by virtue of said lease and the powers therein granted, and said receivers are now using and operating said road and have recognized and adopted said lease, and have elected to enter thereunder upon the premises therein demised, and to avail themselves of the powers, privileges and rights therein conferred upon said lessee."

ANSWER OF RECEIVERS.

To the foregoing petition the receivers filed an answer (Record, pages 28–29), in which they put in issue a number of allegations contained in the petition. Their answer then continued as follows:

"They deny that ever since the 29th day of May, 1884, or at any time since said date, they have held, used or operated intervenor's road under or by virtue of said lease, or the powers therein contained, *or that they have recognized or adopted said lease, or elected to enter thereunder upon the said demised property.* They deny that intervenor's said road is absolutely, or in anywise, necessary to the proper or profitable operation of the Wabash, St. Louis & Pacific Railway, and deny all

the averments of said bill of complaint of intervenor thereto pertaining. They deny that intervenor's said road is a valuable feeder to the main line of said complainant's road, and all the averments of intervenor's said bill of complaint thereto appertaining.

These respondents, further answering, say that pursuant to a general order of this court in that behalf, duly entered in the principal cause, they, as receivers, did on May 29, 1884, take possession, control and management of the intervenor's said railway without inquiry or knowledge by what right, contract or lease the complainant herein had acquired the possession and management of said road of intervenor.

These receivers, further answering said bill of complaint of the intervenor, and by way of exhibit to this Honorable Court of their doings, as they have often heretofore done by various reports, from time to time, in connection with the operation of the line of railway owned, as aforesaid, by the intervenor, respectfully show that from May 29, 1884, to November 30, 1884, inclusive, the gross earnings of the said railway of intervenor operated by these receivers was the sum of $84,281.18; that the total cost of operating the said railroad during the period last before mentioned, was the sum of $135,461.27, including taxes for the year 1884; that the deficit and loss occasioned by the operation of said railroad during the period last aforesaid, amounted to the sum of $51,180.09. * * * *

Wherefore these receivers say that it would be manifestly unjust and inequitable to require them to take the earnings and profits of other branches of the system of railway of the complainant herein and appropriate the same in the payment and discharge of the rents reserved and accruing to the intervenor herein, to the manifest detriment and disadvantage of many creditors and mortgagees having indebtedness against the remainder of said system. These respondents therefore pray the advice of this Honorable Court whether they shall longer continue in the possession and operation of

said road, or whether they shall hereafter adopt or ratify said lease made on the day of 188 , between said intervenor and said St. Louis, Kansas City & Northern Railway Company, or whether they shall deliver the same over to intervenor herein; or in the event the intervenor shall refuse to receive it, they shall abandon the said road, and for such orders and directions in the premises as to your Honors shall seem equitable and proper."

MASTER'S REPORT.

The case was heard before a Special Master who, after stating the pleadings at some length, concluded his report (Record, page 37) as follows:

"I find from the evidence that the operation of the St. Joseph & St. Louis Railroad has been a burden to the rest of the property in charge of the receivers since their appointment, without reference to the rental charge, and that in all reasonable probability it will continue to be a burden if operated by them as heretofore for an indefinite period. The road owned no rolling stock at the date of the lease.

It was contended on the part of the receivers that, inasmuch as the railroad of the intervenor had not earned its operating expenses during the time for which payment of rental is claimed, such rental should not be paid by them; that the amount of rental accruing prior to the appointment of the receivers was an unsecured claim against the Wabash, St. Louis & Pacific Railway Company,and that the amount of rental accruing since their appointment was more than offset by losses in operating the road.

It was, on the other hand, contended by the intervenor that the total amount of rent accruing under the terms of the lease September 1st, 1884, was an indivis-

ible amount; that the receivers by their action in operating the road adopted all the covenants of the lease, and that regardless of the earnings of the road as compared with the expenses of operating it, the intervenor was entitled to be paid thirty per cent of the gross earnings, as called for by the lease.

It was further claimed by the intervenor that it was entitled to be paid its rental under a clause appointing the receivers, of date May 29, 1884, as follows:

'That said receivers also, in like manner (viz., out of the income that shall come into their hands from the operation of said railroad or otherwise) pay all rentals accrued or which may hereafter accrue upon all leased lines of complainant, and for the use of all terminals or track facilities, and all such rentals or installments as may fall due from said complainant for the use of any portion of road or roads or terminal facilities of any other company or companies, and also for all rentals due or to become due upon rolling stock heretofore sold to complainant and partially paid for.'

This clause of the order has been interpreted by the Court in its order of date of April 16, 1885, adversely to this claim of the intervenor.

I do not accede to the proposition of the intervenor that by taking possession of its road through its receivers and operating it to the present time this court has adopted the lease in its entirety, and must continue to operate the road and pay the rental."

EXCEPTIONS OVERRULED.

To the foregoing report of the master the St. Joseph & St. Louis Railroad Company excepted. The exceptions were overruled and a decree was entered dismissing the petition.

POINTS.

1st. The decree ought to be affirmed, because in taking possession of the leased line under the order of their appointment the receivers did not adopt the lease or become bound by its terms. The court, through its receivers, took possession of the leased line and preserved it and operated it for the benefit of its owners.

2nd. The decree ought to be affirmed, because when a court of equity, through its receivers, takes possession of a railroad and preserves it and operates it for its owners, its owners have no claim upon the court or its receivers for the use of the property while it was being preserved and operated for their benefit.

3rd. The decree ought to be affirmed, because the receivers did not take the leasehold estate of the Wabash Company in the St. Joseph & St. Louis Railroad as assignees.

4th. The decree ought to be affirmed, because there was nothing in the orders of the Court, or in the conduct of the receivers, to induce intervenor to believe that its rental would be paid from the earnings of the other lines of the Wabash System.

5th. The decree ought to be affirmed, because intervenor has no equitable claim on the funds of the receivership.

6th. The decree ought to be affirmed, because appellant left its road in the hands of the receivers to be preserved and operated by them at a loss when, by the

terms of its lease, appellant was authorized to take possession of its property at any time after thirty days' default in the payment of its rental.

7th. The decree ought to be affirmed, because there was nothing in the conduct of the Central Trust Company and Cheney, trustees, to render intervenor's claim for rental superior to the lien of the general mortgage on the main lines of the Wabash System.

BRIEF.

I.

The decree ought to be affirmed, because in taking possession of the leased line under the order of their appointment the receivers did not adopt the lease or become bound by its terms.

In the opening paragraph of his argument (page 31) the learned counsel for appellant states the main proposition on which he relies, as follows:

"If the action of the receivers in refusing to be bound by the covenants of the lease as to the payment of rent is sustained, there is an end to the sacredness of contractual obligations. * * * * The action of the receivers and of the Court in May and June, 1884, can not be regarded in any other light than as an adoption by the receivers of the lease and an assumption of its covenants."

We can not understand why, upon the facts in this record, appellant's counsel should say that upon this case depends the question of whether there shall be an

end to the sacredness of all contractual obligations. The inquiry here is not, as he would seem to think, as to whether *a contract, duly entered into by competent parties should be enforced.* The controlling question here is: *Did appellant during the Wabash receivership sustain any contractual relations whatever with the Court or its receivers?*

Appellant had a contract with the Wabash Company, but that company failed and appellant was left, as many others were, with a just claim against an irresponsible party. No one questions the sacredness of appellant's contract with the Wabash Company, or its right to pursue that company in any appropriate action. What we contend is *that the insolvency of the Wabash Company furnishes no excuse for the payment of appellant's claim from the funds of those who were never, in any manner, beholden unto it.*

We think a substantial error is found in the assumption of appellant's counsel, that courts of equity, in the administration of trust estates, make contracts with those whose property they are preserving, or on whose rights they are administering. We do not think the proposition tenable. Our contention is that when the receivers took possession of the St. Joseph & St. Louis Road under the order of their appointment, there was no contract about it. Under the allegations of the bill, the St. Joseph & St. Louis Road was a part of the property to be preserved for its owners until they, in some proper

manner, should assert their right to it. The receivership was only established because it appeared to the Court from the allegations in the bill of complaint, that it would be beneficial to appellant and the other defendants, by keeping their railroads in operation until such time as they could come into court and be heard in their own behalf.

When the Court took jurisdiction of the case and appointed receivers, every defendant was bound to know that the Court would administer the estate on equitable principles, and that should the income derived from the operation of the roads be insufficient to satisfy the contract claims of all, the funds would be given to those who were first in right. In such a receivership one party to the suit could only have, as against the others, that to which he could show a superior equity, and we do not think it has ever been held that by reason of any order made by the chancellor, one party has become entitled, *on the score of contract with the Court*, to more of the fund than equity would give him.

2nd. Counsel for appellant (page 31 of his brief) states a rule to which we take no exceptions when it is applied to a proper case. He says:

"The law is well settled, and it was at that time well settled, that while persons upon whom a lease devolves in a trust capacity, or for the benefit of third parties, or by operation of law, are not compelled to adopt such lease, yet if they do adopt it they are bound by all its covenants."

We do not question the foregoing proposition when it is applied to receivers *who have an option, and who may*

adopt a lease if they so elect. But the rule he states can have no possible application to *receivers in chancery*, who only hold as officers of the court and who can not, if they would, either make or adopt leases without express authority from the court.

In order to render one called a "receiver" liable as a party to a lease, by adoption or otherwise, two things are absolutely essential:

1st. The receiver, or person to be charged, must be one *who is capable of making an election*; and

2d. He must by some unequivocal act evince his determination *to accept the lease and become bound by its covenants.* Both those conditions are wanting here.

In this case, Humphreys and Tutt had no power to make an election, and even if they had possessed the requisite authority the record shows no act on their part evincing a desire to accept the lease of the St. Joseph Line. Every report they made to the Court showed that they were operating that road at a loss and the record shows that they made repeated inquiries as to whether they should not abandon it.

The point that the receivers had elected to take possession of appellant's line was strongly urged and fully considered in the court below, and in passing upon it the Court (Thayer, J.) then said:

"It appears to me that the receivers did not elect to take the leased lines in the sense in which that term is used in the books, but at the same time I do not regard the question as to whether their action was voluntary or

enforced as at all material. They had possession of the leased lines and operated them. If the Court ordered them to take possession of the same for the benefit of any particular interest or class of interests involved, and without any reference to the protection of the rights of the lessor companies themselves, then those interests for whose advantage the leased lines were taken and operated by the receivers should stand the expense of the rental, and the court would be bound to so order. The court has no more right than an individual to use one person's property for the exclusive benefit of another without paying for its use.

"But from the record and proceedings in this case, it does not appear to me that any property was so taken and used. The entire system was taken in hand at the instance of the general owner to protect the interests of all parties concerned. The court, through its receivers, at all times adopted that line of policy which seemed to be conducive to the best interests of all parties as then foreseen."

In this connection great importance is attached by counsel for appellant to the case of Woodruff vs. Erie Ry. Co. (93 N. Y., 609). But that case differs from this in the following essential particulars:

1st. In that case the receivers were not directed by the court, as they were here, to take possession of the leased line.

2d. It was not alleged in that bill, as it was in this, *that the receivership was in the interest of or would be beneficial to the leased line*; and

3d. By the order of their appointment (page 621) the receivers were *required, in the exercise of a sound discretion*, to determine what leases they would accept, and

it was expressly provided that they should not be required to accept any lease which they did not consider advantageous.

The cases are clearly distinguishable on principle, and hence it is not necessary for us to question the soundness of any conclusion reached by the Court in the Woodruff case.

3d. *There was nothing in the action of the court or its receivers, in May and June, 1884, which could be regarded as an acceptance of the lease and an assumption of its covenants.*

As it is contended by appellant that "the action of the receivers and of the court in May and June, 1884, must be regarded as an adoption by the receivers of the lease and an assumption of its covenants," it becomes important to examine the record and see just what was done by the court and its receivers in the months of May and June, 1884, which should be so regarded. Briefly stated, the facts in the case are as follows:

1st. On the 27th day of May, 1884, the Wabash Company, which was then, as the record shows, largely indebted to appellant, filed its bill of complaint in the Circuit Court of the United States for the Eastern District of Missouri, in which it alleged its insolvency and prayed the Court to appoint receivers to take possession of all its property. In its bill the Wabash Company repeatedly asserted, in different forms of expression, that

in asking for the appointment of receivers it was acting in the interest of its various creditors rather than its own interest. Among other statements in the bill were the following:

"And your orator prays your Honors to make such order in the premises as will insure the protection of the interests of orator and its creditors, giving an opportunity to all the defendants not served with notice to be heard hereafter; and orator avers that no injury can arise to any creditor or person in interest from the appointment of said receivers, with or without notice, as such receivers' possession will inure to the benefit of all the persons concerned."

2nd. On that bill the Court on the 27th day of May, 1884, appointed Solon Humphreys and Thomas E. Tutt receivers of all the railroads and property of the Wabash Company, "with power and instructions to take possession of the same and manage, control and operate said railroads, and preserve and protect all said property."

The order also contained (Record, page 239) the following:

"It is further ordered that said receivers, out of the income that shall come into their hands from the operation of said railroads, or otherwise, proceed to pay all balances due or to become due to other railroad or transportation companies growing out of the exchange of traffic accruing during the six months prior thereto.

That said receivers also in like manner pay all rentals accruing, or which may hereafter accrue upon all leased lines of said complainant, and for the use of all terminal or track facilities and all such rentals or installments as may fall due from said complainant for the use of any portion of road or roads, or terminal facilities of any

other company or companies, and also all rentals due or to become due upon rolling stock heretofore sold to complainant and partially paid for.

That said receivers also pay in like manner, out of any income or other available revenues that come into their hands, all just claims and accounts for labor and supplies, professional services, salaries of officers and employes that have been earned or have matured within six months before the making of this order.

That such receivers keep such accounts as may be necessary to show the source from which all such income and revenues shall be derived; with reference to the interest of all parties herein and the expenditures by them made."

Under the foregoing order the receivers on the 29th day of May, 1884, took possession of all the Wabash railroads.

3rd. Afterwards, on the 26th day of June, 1884, (Record, page 246) the receivers made a report to the Court (but no mention was made therein of the St. Joseph & St. Louis Line), in which they stated that they had not been able to pay from the income the interest on certain mortgage bonds that fell due on the first day of June, 1884.

They further stated to the Court that the "Wabash, St. Louis & Pacific Railway Company" was organized in 1879 by consolidating the lines of the "Wabash Railway Company" with the lines of the "St. Louis, Kansas City & Northern Railway Company" which companies were at and before said date possessed of certain lines of railroad in the States of Missouri, Iowa, Illinois, In-

diana and Ohio, but which were held by them subject to mortgages and deeds of trust previously executed, to secure certain bonds and obligations, to wit: (Here followed a list of twenty-six mortgages resting on the various lines and divisions of the Wabash System.)

Then followed this paragraph:

"Your petitioners further state that they are advised and believe that each and all *of the aforesaid lines of railroad* (the St. Joseph Line not having been previously mentioned in said petition) which were owned or controlled either by the 'Wabash Railway Company' or by the 'St. Louis, Kansas City & Northern Railway Company' before their consolidation in 1879 under the name of the 'Wabash, St. Louis & Pacific Railway Company,' have at all times during the five years last past, or ever since their construction, earned more than enough to pay all their operating expenses, the cost of maintenance and interest *upon the several series of bonds above described*, and respectively *secured upon them* by the mortgages and deeds of trust aforesaid."

It will thus be seen that the receivers only asked instructions concerning the payment of the interest on certain mortgage bonds, and that in the petition they only expressed their opinion concerning the capacity of the enumerated lines to earn their interest. They made no mention in that petition of the St. Joseph & St. Louis Line, nor did they express any opinion with respect to its value, or ask any instructions concerning the payment of its rental. Further on in the petition the receivers made specific mention of ten leased lines and prayed the Court for instructions with respect to the manner in which they should dispose of the earnings and keep the

accounts of their earnings and expenses, but the St. Joseph & St. Louis Line was not mentioned in that connection.

5th. On the 28th of June, 1884, the Court entered an order (Record, page 255) directing the payment of interest, under certain restrictions, on the bonds specifically described in the foregoing petition, but no instructions were then given by the Court with respect to the payment of any rental due or to become due under the St. Joseph & St. Louis lease.

From the foregoing record we find that the only act of the Court during the months of May and June, 1884, which had any reference to the St. Joseph & St. Louis Line was *the act of appointing the receivers*, and that, too, on a bill which represented to the Court that the interests of the appellant would be subserved by their appointment. We also find that the only acts of the receivers performed during the months of May and June, 1884, from which appellant says we must infer an intention on their part to adopt the lease and assume its covenants, was *the act of taking possession of the property as directed by the Court;* and afterwards reporting to the Court on June 26th that they believed certain enumerated lines of the consolidated system were earning the interest on their bonds, and that certain others were not, but expressing to the Court no opinion whatever with respect to the appellant's line.

We submit that under the circumstances of this case, and the allegations of this bill, those acts should not and can not be regarded "as an adoption of the lease and an assumption of its covenants."

II.

The decree ought to be affirmed, because when a court of equity, through its receivers, takes possession of a railroad and preserves it and operates it for its owners, its owners have no claim upon the Court or its receivers for the use of the property while it was being preserved and operated for their benefit.

From the beginning of this litigation it has been contended by appellant that the receivers were liable for the rental due from the Wabash Railway Company to it as lessor, because, as they have said, the receivers *elected to take and hold the leased property under the lease.*

But we do not understand how any action of the receivers taken at the instance of the Wabash Company could, on any principle of justice, authorize the Court to invade the property rights *of the other defendants in the suit*—those with whom appellant had no contractual relations—in order to satisfy its claim for rental. Appellant says the receivers are liable if they held and used the leased property in the execution of their duty as receivers, and it contends that it is perfectly immaterial whether the receivers held the property as the result of their own judgment, or in the execution of an order of the Court.

The vice of appellant's proposition consists, we think, in wholly ignoring the objects and purposes for which the Wabash receivership was established. If it was established for the preservation of the property of appellant, as well as for the preservation of the property of the other defendants in the suit, and if in the execution of their duties under such a proceeding the receivers took possession of appellant's line and preserved it for appellant's own good, we do not see on what principle *the taking of possession*, under such circumstances and for such purposes, can be said to make the Court or its receivers liable to appellant on the personal covenants of the Wabash Company to pay a rental. If the Court or its receivers had taken and used appellant's road for their own benefit, *or for the benefit of any other party to the suit*, then it is clear that the receivers, or the party for whose benefit appellant's road was used, should pay a reasonable compensation for its use.

But that is not this case. Appellant's road was not taken or held by the receivers at the instance of any other defendant in the cause, and hence no other defendant in the cause ought to be charged with its rental.

The whole argument made by appellant in support of its contention, to the effect that the receivers elected to accept the lease is based, as it seems to us, upon a total misconception as to the nature of the proceeding and the purposes for which the receivers were appointed over the property.

The bill was filed by the Wabash Company because of its insolvency and consequent inability to longer continue the fulfillment of its contracts. It prayed for the appointment of receivers to take possession of and operate all its railroads for the benefit of all its creditors, according to their respective legal and equitable rights. It brought all the lessor companies, as well as all parties interested as mortgagees or trustees, including appellant, before the Court as defendants, and from thenceforward each was at liberty to assert his or their own rights. No promises were made to them, and they had no reason to expect that the Court would at any stage of the proceedings cast the burden of any unprofitable leases, or other agreements entered into by the Wabash Company, upon any defendant or class of defendants, for the sole purpose of paying appellant its rental.

It is true that the order appointing the receivers directed them to pay generally from earnings all rentals accrued or which might thereafter accrue on the leased line; but there was nothing in the order appointing the receivers to induce appellant to believe that its claim for rental would be treated as a *preferential debt*, or charged as a lien upon the other lines of the system. On the contrary, the clause of the order directing the receivers to keep the accounts of each line separately, as well as every report of the receivers, and subsequent order entered in the case was ample notice to appellant that its road would be operated on its own merit and that no rental would be paid unless it was earned.

The truth is, that, in order to ascertain the rights of the defendants in Wabash case, as against each other, it must be borne in mind that the Wabash receivership was established at the instance of an insolvent company, and that after their appointment the receivers were mere custodians of a large number of railroads, all of which the court had taken possession of, not in the interest of any particular creditor or party to the suit, *but for the preservation of all the properties and for the benefit of all creditors and all parties to the suit.* Instead of having funds, or representing any party who had funds, the receivers were without funds, and the properties in their hands were not only encumbered with mortgages, but burdened, as the record shows (page 314), with a preferential indebtedness superior to all mortgages, amounting to $4,417,491. Therefore the receivers—instead of representing any substantial interest of the Wabash Company, or having funds of that company upon which they could draw for the purpose of discharging its obligations to its various creditors—were in a position *where they had to draw upon the various lines and subdivisions* for funds with which to discharge the preferential debts which the company had contracted in the operation of all its lines. There was, at the beginning, nothing out of which the Court could pay the preferential debts, or any one party before the Court as a defendant whose interests should be protected in preference to another, or whose property ought, in equity, to be taxed to preserve the interests of any other defendant.

The theory of the bill, on which the receivers were appointed, being that the Court should preserve and operate all the roads for their equal benefit, there could be no just reason for saying that one line was being operated for the benefit of another line, or for saying that the earnings of one division should be taken to satisfy the *mere contract obligations* of the Wabash Company to another division. Under such a receivership it could no more be said, with truth, that the branch or leased lines were being operated by the receivers for the benefit ofthe main lines, and that therefore the main lines should be charged with the interest or rental due the branch lines, than it could be said, with truth, that the main lines were being operated for the benefit of the branch lines, and that therefore the branch or leased lines should be charged with interest due to the main lines.

After the Wabash Company became insolvent and the receivers were appointed, there were no contractual relations existing between one line or set of lines and another line or set of lines which made it equitable to take the funds of one for the benefit of the other. Therefore, it was the duty of the Court to distribute the earnings of the system, not in recognition or discharge of any contract obligations of the Wabash Company, but on equitable principles giving to each creditor what he was justly entitled to according to his rank or class. If there was a class of preferential debts which was prior in equity to rentals or the interest on mortgage bonds, it was the duty of the court to

pay all in that class from net earnings before it applied anything to rentals or interest on bonds. In paying the preferential claims the Court would be acting equitably, because it would be emancipating each line in the system from an indebtedness which rested on all alike, and which was, under the decisions of this Court, a lien superior to all others. But when it come to taking the earnings of one line to pay interest or rentals due on another, a different question was presented, because no one line or division had superior claims upon the earnings of any other.

Those facts, with respect to the receivership, the manner and purposes of its creation and the relations which the several divisions sustained to each other, must be borne in mind in all our efforts to ascertain their rights.

On what equitable principle should the burden of paying the rental due to one line have been saddled upon another, without it could be truthfully said that the line to be paid its rental had been used for the benefit of the line charged; or unless those interested in the line to be charged were in some legal or equitable manner obligated to make the payment? It would be difficult, we think, for appellant to designate the step taken or act done, in the course of this litigation, by those holding bonds secured by mortgage on what are called the main lines, which would make it more equitable to charge the rental due the leased lines as a lien on the main lines, than it would be to charge the interest due on the main lines as a lien on those that were leased.

When the St. Joseph & St. Louis Company constructed its road it did so under an implied agreement with the public that its road should be operated and that it would look for its rental to what might be left after all operating expenses had been paid. True, appellant afterwards entered into an unsecured personal contract with the Wabash Company, in which the latter company agreed to operate the road and pay a rental. But after the Wabash Company had proved insolvent, on what principle could it be said that appellant was entitled to draw upon the earnings of the other lines for its rental, when none of the other lines, or their earnings, had been mortgaged or pledged to appellant, and when no one interested in the other lines had done any act, or caused any order to be entered, affecting or changing the rights of the parties as they stood at the commencement of the litigation, with no sort of contractual relations existing between them?

If before the receivers were appointed the rental due appellant was an unsecured obligation, by what process and at what time did appellant become entitled to the earnings of the other divisions of the system in preference to those holding bonds secured by mortgage upon the divisions earning the money? Why should appellant, that had no mortgage upon the lines that earned the surplus, be preferred to those defendants who held bonds, secured by mortgage on the lines, earning the surplus? On what equitable principle should the other lines of the system that have already emancipated

appellant's line from the lien of the labor and supply debts, and made good a deficit of over $77,000, contracted by the receivers in preserving and operating its property, now be required to contribute to appellant an additional sum sufficient to discharge its rental?

Equity would not require one line to pay more than its due share of any debt, for which all were alike holden. And if that be true, then why should appellant get its property free from the preferential debts and liens, while those interested in the other lines were not only denied their interest and rental, but were ultimately compelled to take their properties subject to the lien of a large unpaid balance for labor and supplies?

Appellant was one of the defendants in the case, and if it did not approve of the allegations in the bill, to the effect that it was better for its line to be operated by the receivers in connection with the others, keeping the accounts of its earnings and expenses separately, why did it not, as a party to the litigation, make known its wishes to the court in some appropriate manner? And why did it not ask possession of its property, when it knew the Wabash Company—the only party with whom it had a contract—had become insolvent, and when it knew from the reports of the receivers that its line was being operated at a loss instead of a profit? And why should appellant now be heard to contend that its line was used for the benefit of the others, any more than that the other lines were being used for its benefit, and on what

equitable principle should the other lines now pay its rental and have no similar claim on appellant for their interest or rental?

In view of all the facts shown in this record we think the rights and duties of appellant, and of all other parties to the suit, were stated with perfect accuracy in the opinion rendered in the court below. In the course of his opinion (Brewer, J.) then said:

"Again, if the action of the Court in making the appointment, and of the receivers in taking possession, did not of itself create a new and legal obligation against the mortgagees, are there any equitable reasons why the claim of the lessor should be given priority to that of the mortgagee? The lessor was defendant as well as the mortgagee; each knew his rights; each, summoned into court, was at liberty to assert his rights. Neither was told directly or by implication that he would gain aught by the action of the Court in making the appointment. As the mortgagee might come in and did come in asking foreclosure of his mortgage, so the lessor might come in, and many did, demanding the surrender of the leased property for non-payment of rent. These very intervenors, after the lapse of some months, came in and asked possession of their property, which was promptly surrendered. Why should the mortgagee be compelled to pay the lessor any more than the lessor be compelled to pay the mortgagee? Each was summoned into court, each was called upon to make a showing of its claim, and each did so in time and manner that suited it. Because there were various properties, covered by separate mortgages, all merged in one system, and as such covered by one subordinate mortgage, is there any equitable reason why the Court, seizing upon all of the properties at the instance of the common debtor, can be said to have created any new and different equities

between these various creditors? Did not each stand upon his legal rights—rights as they existed before the receivership, and rights which could be asserted at any time, and were, in fact, asserted as soon as each party saw fit?"

And Thayer (J.) then said:

"Attention has already been called to the fact that the bill in this case was filed by the mortgagor against all persons and corporations, including the lessors, who were interested in the various roads forming the complainant's railroad system.

As I understand the bill of complaint, the complainant professed to be acting not alone in the interest of mortgagees, but in the interest of all the corporations whose roads had become an integral part of the system, whether by lease, consolidation or otherwise.

It was substantially represented by the bill that the affairs of the complainant had become so complicated by the various mortgages that had been executed, the consolidations that had taken place, and the leases made or assumed, and by the admixture of rolling stock, that the best interests of all parties concerned demanded the appointment of receivers over the whole system as the only feasible method of working out the equities appurtaining to each.

It was on account of such representations that the receivers were appointed and ordered to take possession of the whole system. In other words, the receivership was not created for the benefit or protection of any one interest or class of interests, but for the benefit of all parties to the suit who were in any wise interested in the system. The lessor companies, whose roads went into possession of the receiver, were advised of such facts by the form of the bill and by the prayer for relief. They were at liberty, at any time after it was filed, to show that the extension of the receivership over the leased lines was not necessary to the protection of any interest

of the lessor companies, or that it was detrimental to such interests. If such showing had been made (and it appears to me that the lessor companies were cited into court to confess or deny the averments of the bill in that behalf), the leased lines would unquestionably have been released at any stage of the proceeding.

Intimations to that effect, and of the theory on which the court was proceeding, appear to have been given during the progress of the case from time to time; but so long as the lessor companies acquiesced in the averments contained in the bill, and on the faith of which receivers were appointed, it appears to me that the receivership continued to stand for their protection and for the protection of the interest of all persons and corporations who were parties to the proceeding, and that so long as that state of affairs existed the relative rights of the parties were not changed, and that the mere possession by the receiver of the leased lines did not have the effect of making the rentals a charge on the body of the mortgaged property, superior in rank to the mortgage debt." * * *

"The question before us should not be determined, in my opinion, with any reference to the question whether it was in fact necessary for the protection of the interests of the lessor companies to extend the receivership over the leased lines, although if we were at liberty to consider that matter it seems probable, in view of the condition of one of the leased roads, that if it had not been taken in hand by the receivers it would have suspended operations for a time at least and put the public to great loss and inconvenience, even if it had not incurred a forfeiture of its franchises.

But, be this as it may, the question is not to be determined by considering whether the representations of the bill were erroneous in so far as the leased lines were concerned. We must consider what the bill did in fact allege; upon what theory it was drawn, and for what purpose the Court appointed receivers and for whose benefit, and whether in the light of such facts and the subse-

quent acquiscence of the lessor companies they can now legally or equitably insist that because the receivers took possession of their road under an order of the Court the rentals which accrued during the period of such possession must perforce take precedence over the mortgage debts, although such leased lines during the period in question did not pay operating expenses.

In my opinion, this question must be answered in the negative. The case is so exceptional in its character that the principle invoked to establish the liability in question, in my judgment, is not applicable." * * *

"It appears to me that the receivers did not elect to take the leased lines in the sense in which that term is used in the books, but at the same time I do not regard the question as to whether their action was voluntary or enforced as at all material. They had possession of the leased lines and operated them. If the Court ordered them to take possession of the same for the benefit of any particular interest or class of interest involved, and without any reference to the protection of the rights of the lessor companies themselves, then those interests for whose advantage the leased lines were taken and operated by the receivers should stand the expense of the rental, and the Court would be bound to so order. The Court has no more right than an individual to use one person's property for the exclusive benefit of another without paying for its use.

But from the record and proceedings in this case it does not appear to me that any property was so taken and used. The entire system was taken in hand at the instance of the general owner to protect the interests of all parties concerned. The court, through its receivers, at all times adopted that line of policy which seemed to be conducive to the best interests of all parties as then foreseen."

III.

The decree ought to be affirmed, because the receivers did not take the leasehold estate of the Wabash Company in the St. Joseph & St. Louis Railroad as assignees.

In his brief the learned counsel for appellant has collected a large number of cases in which assignees in bankruptcy and statutory receivers have been held liable for accruing rentals, but in those cases it was held that under the statutes the assignees, or receivers, had taken the leaseholds *as assignees*, and they were held liable only because *of the privity of legal estate* which their appointment had created between them and the lessors. But this was not that sort of a case. This was an ordinary *chancery receivership*, created at the instance of the Wabash Company for the benefit of all the defendants in the bill.

Counsel for appellant has not referred to one single case in which it has ever been held by any court that an ordinary chancery receiver *took title* to the property over which he was appointed. On the other hand, exactly the contrary is abundantly shown by the following authorities, in which the question has been directly considered and determined:

In Wood's Landlord and Tenant (2nd Ed., p. 723) the rule on this subject is briefly but fully and forcibly stated as follows:

"A receiver *pendente lite* appointed in an equity suit is clothed with no estate in the property entrusted to him, and is a mere custodian of it for the court, and therefore by taking possession of the leasehold estate he does not become an assignee of the term."

The question of whether receivers in chancery take the legal title to the property placed under their control has also been recently considered in this court. In speaking on that subject in Chicago Union Bank vs. Kansas City Bank (136 U. S., 223) the Court said:

"A receiver derives his authority from the act of the Court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court for the benefit of the party ultimately proved to be entitled, *but not to change the title* or even the right of possession in the property. Skip vs. Harwood, 3rd Atk., 564; Wiswall vs. Sampson, 14 How., 52, 65; Ellis vs. Boston, Hartford & Erie R. R., 107 Mass., 1, 28; Maynard vs. Bond, 67 Mo., 315; Herman vs. Fisher, 11th Mo. App., 275, 281."

The case of Gaither vs. Stockbridge (67 Md. 222) is also one in which the identical questions presented in this record were considered and determined.

In that case the "Duffy Malt Whiskey Company" became insolvent, and under a creditor's bill Stockbridge was appointed receiver, and directed by the Court "to take charge and possession of the goods, wares and merchandise, books, papers and effects of the company." The whiskey company had leased from Gaither a warehouse, and when the receiver was appointed he took possession of the warehouse and the property therein,

and retained the same until the goods were sold out at auction. After the goods had been sold and removed from the premises, the receiver tendered the key of the warehouse to Gaither, the lessor, who refused to receive it. Gaither then petitioned the Court to pass an order directing Stockbridge, the receiver, to pay to him a quarter's rent that soon after fell due out of moneys received from the sale of the property of the whiskey company. In deciding the case the Court said:

"There are two questions presented in this appeal: 1st, Whether the receiver became assignee of the term created by the lease from the appellant to the Duffy Malt Whiskey Company of the warehouse and premises occupied by that company at the time of the appointment of the receiver, so as to make him liable for the rent that became due and payable on the 1st of December, 1886; and 2nd, if the receiver has not become such assignee or tenant, and as such liable for the rent, whether the appellant had any such preferred lien or charge, *for the accruing rent*, upon the goods and chattels of the lessee upon the premises at the time of the appointment of the receiver, and which went into his hands, and were sold on order of Court and taken from the premises, before the rent became due, as will entitle the appellant to be paid in full out of the proceeds of the sale of such goods and chattels?

"The Duffy Malt Whiskey Company was alleged to be utterly insolvent and unable to pay its debts; and, upon a creditor's bill filed, the appellee on his appeal was appointed receiver on the 12th day of November, 1886. By order of the Court appointing the receiver, the latter was ordered 'to take charge and possession of the goods, wares and merchandise, books, papers and effects' of the company so alleged to be insolvent. In pursuance of this order the receiver did take possession of such goods and chattels found on the premises, and retained

the same until the 22nd day of November, 1886, when under an order of Court, he sold such goods and chattels, at auction, on the demised premises where they had remained from the time the receiver took possession thereof. After making sale of the goods and chattels and the same had been removed from the premises by the purchasers, the receiver, on the 29th day of November, 1886, tendered the key of the warehouse to the attorneys of the appellant, who refused to receive the same; and afterwards, by direction of the Court, he deposited the key with the Clerk of court for the appellant.

"The ordinary receiver of a court of chancery is supposed to be an indifferent person as between the parties to the cause, whose functions or office it is to receive and preserve the property or fund in litigation *pendente lite*, when it is made apparent to the Court that the rights of the parties concerned require such protection. He is an officer of the Court, and the fund or property entrusted to his care is regarded as being in *custodia legis*, to await the ultimate disposal thereof by the court, according to the rights and priorities of the parties concerned. The court itself has the care of the property, by its receiver, and that officer being the mere creature of the court, has no powers other than those conferred upon him by the court, or derived from its established practice. *His appointment does not change the title of the property, or create any lien upon the same, in favor of any of the parties interested; his holding being for the benefit of the party who may be ultimately determined to be entitled.* *Booth vs. Clark*, 17 How., 322, 331; *Ellicott vs. Ins. Co.*, 7th Gill., 320; *Ellicott vs. Warfield*, 4 Md., 85.

"Such, then, being the nature of the office and duty of a receiver and his relation to the court, it is manifest that the scope of his duties and powers are very much more restricted than those of an assignee in bankruptcy or insolvency. *In the case of an assignee in bankruptcy, the law casts upon such assignee the legal title to the unexpired term of the lease, and he thus becomes*

assignee of the term by operation of law, unless from prudential considerations he elects to reject the term as being without benefit to the creditors. But not so in the case of receivers, unless it be as in the State of New York and some of the other States, where by statute a certain class of receivers are invested with the insolvent estate, and with powers very similar to those vested in an assignee in bankruptcy. Booth vs. Clark, 17 How., 331, 335.

"*The ordinary chancery receiver, such as we have in this case, is clothed with no estate in the property*, but is a mere custodian of it for the court, and, by special authority, may become an officer of the court to effect a sale of the property, if it be deemed necessary for the benefit of the parties concerned. *If the order of the court under which the receiver acts embraces the leasehold estate, it becomes his duty, of course, to take possession of it. But he does not, by taking such possession, become assignee of the term in any proper sense of the word. He holds as he would hold any other personal property involved, for and as the hand of the court and not as assignee of the term.*

"In those cases where the goods of the lessee are remaining on the demised premises at or after the time when the rent becomes due, and the landlord seeks to exercise his right to distrain, and the only impediment to the exercise of the right is the possession of the court by the receiver, it seems to be a settled rule of practice to order the receiver to pay the arrears of rent out of the proceeds of the property, or to permit the landlord to proceed with his distress, notwithstanding the possession of the receiver. Martin vs. Block, 9th Paige, 64; Exparte Plummer, 1st Atk., 103, 104.

"But here there is no such question presented, and we do not understand that it is contended that the receiver has become the assignee of the entire residue of the unexpired term of the leasehold estate, with the right to dispose of it. What seems to be contended for is, that the receiver has, by entering upon the demised premises, to take possession and to sell and dispose of the goods

and effects of the lessee, under the order of the court, made himself liable, as assignee or tenant of the premises, to the extent of the quarter's rent falling due on December 1, 1886. But this, we think, manifestly can not be maintained. No such liability should be imposed upon the receiver for simply performing his duty under the direction of the Court. The Court has given no direction that the leasehold interest should be sold; and, indeed, the lease, by its terms, is not assignable except it be by the express written assent of the lessor, and it is restrictive in respect to the use of the demised premises. We are clearly of opinion that the receiver is neither assignee in fact nor by operation of law, and therefore could not be held liable as tenant for the use and occupation of the premises."

The case of Yeager vs. Wallace (44 Penn. State 294) was one in which the question of whether receivers, in Chancery, took a legal estate in the property placed in their custody, was sharply presented and squarely decided. In that case Wallace was appointed receiver of a partnership estate, and *as receiver* he sued Yeager *in trover* for the conversion of a quantity of marble and other assets of the firm. As trover could only be maintained by one having a *legal title*, the question was as to whether Wallace, the receiver, took such title to the assets of the firm. In deciding the point the Court (Strong, J.) said:

"But can a receiver of the property of a partnership maintain an action of trover in his own name for the conversion of the personal property of a firm by a wrongdoer before the appointment of receiver was made? He is but an officer of the Court which appoints him, and does not become *the legal owner* of the property which he is required to take in charge. The appointment of a receiver

does not transfer to him the legal rights of the partnership in any of their choses in possession or in action. Trover can only be maintained by him who has the legal right. How, then, can the receiver sue, except in the name of the firm? That he can not, not only seems manifest upon principle, but is established by authority. Thus in Taylor vs. Allen, 2 Atk., 213, Lord Chancellor Hardwicke appointed a receiver to collect the assets of a testator, and empowered him to bring actions *in the name of the executrix.* In Pitt vs. Snowden, 3 Atk., 750, the same chancellor said a receiver must distrain in the name of him who has the legal right. * * * *

"I do not find it has ever been decided that a receiver can sue in his own name for any debt, claim or demand of a party of whose effects he has been appointed receiver, or to recover the possession or control of any real estate or choses in action of such party, unless some statute has enabled him. He has always been regarded, not as having the legal right, but as a mere custodian to take charge of the property during a pending litigation. If possession be withheld from him by the party whose property has been taken charge of by the court, delivery to the receiver is enforced by attachment. If a third person, not a party to the proceedings in equity, withhold the property, suit may be brought by the receiver with the consent of the Court, but he must bring it in the name of him who has the legal right. In New York, it is true, a receiver is more than a custodian. He is a statutory assignee. But this is in consequence of the statute of that State of April 28, 1845, Laws 90, 91, and of the Code of 1849. * * * * * *

"Without the Statutes of New York it was never ruled in that State that a receiver had the legal title even to personality. The right to sue in his own name was always rested upon the act of 1845 or upon the Code, or upon an act passed in 1825, not upon any rule or course of practice in chancery. See 1 Johns. Chan., cases 10, S. & M. 577. In Wilson vs. Allen. 6 Barb, 545, it is said that at law an ordinary receiver was not considered as

having the legal title, so as to authorize him to institute a suit in his own name for any debt or demand transferred to him (under the order of his appointment) or to the possession or control of which he was entitled, under an order of the Court, until the act of 1845. There is no act of Assembly in this State that gives to a receiver of a court of equity anything more than an equitable interest in the property or rights in action committed to his charge or which invests him with the legal ownership. It seems, therefore, to follow that he can not sue in his own name, and that the present suit, being in the name of the receiver, was erroneously brought."

The case of Central Trust Company of New York vs. Wabash, St. Louis & Pacific Railway Company Swayne, intervenor—in Cir. Court U. S. for Dist. of Indiana, (46 Fed. Reporter, 26), was one which grew out of this identical litigation. That was an intervention by Swayne, trustee, to recover from Humphreys and Tutt, receivers, a rental due under a lease made by the Indianapolis, Peru & Chicago Railroad Company to the Wabash Company in June, 1881. When Humphreys and Tutt were appointed receivers of the property of the Wabash Company they took possession of the Indianapolis, Peru & Chicago Road (a leased line) and operated it from May 29, 1884, until October 23, 1885. No rent having been paid by the receivers, Swayne, the trustee, in a senior mortgage, intervened, and prayed the Court to make an order directing the receivers to pay the rental, and also prayed that the claim for rental be decreed a lien superior to all mortgages on all the property of the Wabash Company. In that case all the questions presented upon this record were reviewed and the Court (Woods, J.) held:

"When an insolvent railroad company upon its own petition procures the appointment of receivers to take possession of its road and leased lines, and in the same suit trustees of a mortgage upon the property ask and are denied an appointment of receivers or an extension of the receivership under their cross-bill, but obtain a decree of foreclosure and sale of the property thereon, the rentals of the leased lines while in the possession of the receivers do not become a charge upon the corpus of the property to be paid in preference to the mortgage debts."

In the light of the foregoing authorities, we might look in vain for a more accurate statement of the law than is contained in the opinion of the Court below in this case. After stating the facts the Court (Brewer, J.) then said:

"We start with this fact that prior to the appointment of the receivers intervenor's claim was subordinate to that of the mortgagee. It was a claim, of course, good against the income, but not against the corpus—at least not good against the corpus until after the payment of the mortgages—and the first question is whether the action of the receivers in taking possession or of the Court in ordering possession changed the status and gives to intervenor's claim a higher position than it theretofore had. It is strenuously insisted by intervenors that it did, and they say that by taking possession of this leased property the receivers became virtually the assignees of the lease, and therefore bound by its terms, and bound to an extent which binds the property in preference to the lien of the mortgagees. A multitude of citations are made from the text books and decided cases to the effect that where a mortgagee institutes foreclosure proceedings, and upon his application a receiver is appointed, and such receiver takes possession of the property leased by the mortgagor such taking of possession is an acceptance of the lease and binds the receiver

as assignee, and binds so as to concede a preference to the lessor in respect to his rental. In other words, if A, a mortgagee, commences foreclosure proceedings against B, a mortgagor, and a receiver, appointed at his instance, takes possession of the property of C, leased by B, such possession of the leased property is an acceptance by the receiver of the lease, makes him an assignee of the lessee, and binds both him and A, the mortgagee, to the full amount of the mortgage property to the payment of the rents.

"High thus states the rule: 'As a rule, receivers are not liable upon the covenants of the person over whose effects they are appointed, but become liable solely by reason of their own acts, and receivers who have been appointed over a corporation, and who have accepted the trust and taken possession of the assets, do not thereby become liable for rent of the premises held by the company under a lease.

"'Nor can they be held liable until they elect to take possession of the premises or until the doing of some act which would in law be equivalent to such an election, but when a receiver enters upon and occupies premises which had been leased to a corporation over which he is appointed, he thereby becomes liable for the rent due under the lease, the liability in such cases being the common law liability of an assignee of a lease and not for the debt due from the corporation, and in such case, the facts being undisputed, it is proper for the Court to direct the receiver to make payment to the lessor without a reference to determine the matter.'

High on Receivers, 2d Ed., Sec. 273.

"This proposition, fortified as it is by ample citations, is conceded: but is it applicable? This receivership was upon the application of the mortgagor, a party in possession of various properties—some owned, some leased, and all subject to various obligations Could the action of the mortgagor or the decision of the Court upon his application change the relative rights of the

mortgagee and the lessor? Was it in the power of the Court, upon the application of the mortgagor alone, to charge the mortgagee with obligations to which he never assented?

"That this bill was filed by the mortgagor is, of course, conceded, and that its theory was not the preservation of any single creditor's rights, but that of all its creditors, secured and unsecured, is evident from these extracts from the bill:

"'That all or nearly all of said mortgages embraced all rolling stock to be thereafter acquired by the companies executing such mortgages, but that, as such original companies and those lines of railroad have been gradually absorbed in orator's vast system, the rolling stock on said entire system had become so intermingled as to be incapable of division according to the original ownership of the said several lines of road according to said several mortgages, and any attempt to control or dispose of portions of such rolling stock by any court or courts not having jurisdiction of the whole and not competent to deal with orator's entire property as a unit would produce great confusion and uncertainty, and would result in great loss to all persons interested in said rolling stock or in orator's property or securities; * * * and orator avers that the interest of the orator in said road and of all its creditors and holders of the bonds aforesaid are greatly imperiled by the existing prospect of the disruption of said road on the happening of the default impending as aforesaid, and the interests of all parties can only by protected by the interposition of a court of chancery; that if said lines of railroad are broken up as aforesaid, and the fragments thereof placed in the hands of various receivers, and the rolling stock, materials and supplies seized and scattered abroad in the manner above indicated, the result will produce irreparable injury and damage, not merely to orator, but to all persons having any interest in said lines of road and the securities thereof.'

'The idea which underlies this bill is that which underlies the action of a voluntary bankrupt under the

bankrupt law. Finding himself insolvent he surrenders his property to the court to be disposed of for the benefit of his various creditors. Such action in no manner changes the relative rights of his various creditors. They stand subsequent to this action as they did before, and their various rights and equities are determined not by his action in surrendering his property to the custody of the court, but by the terms and obligations of the contracts theretofore entered into. Narrow the question in this way: Suppose A is the owner of a mill and the lessee of an adjacent farm. Having mortgaged both his mill and his leasehold interest, and finding himself insolvent, he applies to the Court by bill for the appointment of a receiver to take possession of his property and dispose of it for the benefit of his creditors: Can it be that his action in filing the bill or the action of the Court in appointing a receiver makes the claim for rental, an unsecured obligation, paramount to the secured lien of the mortgage? The proposition will be startling if true. It would put it in the power of a mortgagor to dispossess the vested lien of the mortgagee and render such lien subordinate to unsecured claims. It is true that after the appointment of a receiver the mortgagee came in with an application for a foreclosure; but the assertion of his rights to a foreclosure was not different from that of the assertion of the lessor to his claim for rent. Each took what rights were given him by his prior contract, and neither by his action waived any of his rights or consented to a subordination of his priority. It is true, also, that the holder of the general mortgage prayed the Court to extend the receivership over a part of the property conveyed to it as a mortgagee. Perhaps if that application had been granted some different question might now arise; but the Court expressly decided against the application, leaving the receivership to stand as it was in the first instance—one granted on the application of the mortgagor and one whose appointment it was believed would in no manner change the relative rights of any creditor."

IV.

The decree ought to be affirmed, because there was nothing in the orders of the Court, or in the conduct of the receivers to induce intervenor to believe that its rental would be paid from the earnings of the other lines of the Wabash System.

In order to determine whether there was anything in the orders of the Court, or in the conduct of the receivers to induce appellant to believe that its rental would be paid by the receivers from the earnings of the other lines of the system, it becomes necessary for us to direct attention to the orders of the Court and the conduct of the receivers.

Stated in their order, the facts are as follows:

First. Under the order of their appointment, the receivers kept the accounts of the earnings and expenses of the St. Joseph & St. Louis Line separately and made quarterly reports to the Court, from all of which it appeared that they were operating the line at a loss.

Second. In October, 1884, when the receivers applied for advice concerning the payment of interest on the "Havana Division," the Court (Treat, J.) publicly announced (Record, page 277,) to all parties, "that it was not going to take the money that belonged to the underlying mortgages to pay interest on non-earning branches." It said: "If they (the branches) have got to fail, they must fail; I will protect the underlying mortgages."

Third. In their answer (Record, page 27), filed as early as February, 1885, the receivers stated that from May 29th to November 30th, 1884, they had operated the St. Joseph line at a loss of $51,188.09; and they then prayed the Court for advice as to whether they should longer continue the operation of the road, deliver the same over to appellant, or abandon it in case appellant should refuse to receive it.

Fourth. On the 20th day of March, 1885, the receivers, through their counsel, stated to the Court (Record, page 261) that the road did not pay; *that appellant was unwilling to accept its road*, and that if the receivers were called on they would advise a cancellation of the lease or that the road should be operated at the expense of appellant.

Fifth. In March, 1885, the receivers (Record, page 267) gave notice to appellant that they had sustained a loss of $77,212.09 in the operation of its line, and that they would on April 13, 1885, apply to the Court for instructions concerning a cancellation of the lease and a surrender of the road to whomsoever the Court might direct.

Sixth. On the 16th day of April, 1885, the Court (Brewer, J.) delivered an opinion (which it then directed should stand as an order), in the course of which it said:

"3d. Where a subdivision earns no surplus—simply pays operating expenses—no rent or subdivisional interest will be paid. If the lessor or the subdivisional

mortgagee desires possession or foreclosure he may proceed at once to assert his rights. While the court will continue to operate such subdivision until some application be made, yet the right of a lessor or mortgagee whose rent or interest in unpaid to insist upon possession or foreclosure will be promptly recognized.

"That, it is true, may work a disruption of the system, as evidenced by the movement just made in respect to this Cairo Division, but the proceeding for disruption will come from the subdivisions. The Court is not sloughing off branches—tearing the system in two—but the disruption, if it comes, will come from those who seek separation and have legal right to so do.

"4th. Where a subdivision not only earns no surplus, but fails to pay operating expenses, as in the St. Joseph & St. Louis Branch, the operation of the subdivision will be continued, but the extent of that operation will be reduced with an unsparing, though a discriminating, hand; that is, if a subdivision does not earn operating expenses and the receivers are running two trains a day, then lop one of them off. If they are running one train a day and still it does not pay, then run one train in two days. While the Court will endeavor to keep that subdivision in operation, it will be made, the burden of it, to the consolidated corporation and to all the other interests put into that consolidated corporation a minimum."

The foregoing is the record. It shows that the receivers were prompt in reporting to the Court their losses upon the line; it shows that in October, 1884, the Court informed all parties that it was not going to take the money that belonged to the underlying mortgages to pay interest and rentals on non-earning branches; it shows that in their answer filed in February, 1885, and in their notices and petitions filed in March, 1885, the

receivers asked the Court whether they should continue the operation of the road or abandon it, and that finally, on the 16th day of April, 1885, the Court made the explicit order from which we have quoted, in which it said that *where a line earned no surplus no interest or rental would be paid.*

Notwithstanding all this, the appellant was unwilling to receive its road, and did not do so for more than a year after the order of April 16, 1885, in which it was so pointedly informed that it would not receive its rental.

And yet, notwithstanding the foregoing facts, it is now seriously contended that the conduct of the receivers and the orders of the Court were such as led appellant to believe its rental would be paid.

The same claim was made in the court below, and in discussing that question, and the effect that ought to be given to its own orders, the Court (Brewer, J.) then said:

"There was certainly nothing in the action of the Court or the various orders made by it which gave to any party the right to expect other than his legal claims. Of course, the order in the first instance was to pay rentals out of the income, and that income, as we have seen, is all exhausted in preferential debts and operating expenses. Early in the history of receivership the order of the Court was to keep separate accounts of the earnings of the different lines, and the clear intimation of all the orders and opinions, as well as the express language of many, was that the income from any property part of the general system would be appropriated to the specific claims upon that property."

And the Court (Thayer, J.) then said:

"The entire system was taken in hand at the instance of the general owner to protect the interests of all parties concerned. The Court, through its receivers, at all times adopted that line of policy which seemed to be conducive to the best interests of all parties as then foreseen. Among other things done for the protection of all parties to the litigation, at an early day it made an order to prevent the earnings of the numerous roads composing the system from becoming confused. It appears to me that such order, so far as it related to the leased lines, was a most explicit avowal that the Court did not regard the rentals that from time to time accrued as an expense of administration, and that it did not regard the receivership as having been created for the benefit of the mortgagees or any particular class of creditors, but for the mutual advantage of all parties concerned, the lessor companies included."

We think the foregoing opinions, when read in connection with the facts in the record, conclusively show that there was nothing in the orders of the Court, or conduct of the receivers, to induce intervenor to believe its rental would be paid from the earnings of the other lines of the system.

V.

The decree ought to be affirmed, because intervenor has no equitable claim on the funds of the receivership.

The question of whether appellant has any equitable claim on the funds of the receivership, depends entirely upon the relations sustained by appellant to the fund in court, and the relations it sustained to the other parties to the suit. The following facts are conceded:

First. It is admitted (Record, page 314) that the labor and supply claims and other preferential indebtedness due by the Wabash Company when the receivers were appointed, amounted to the sum of $4,417,491.00.

Second. It is not pretended that appellant, or its line of railroad, has contributed anything towards the payment of the preferential claims.

Third. It is conceded that the receivers operated appellant's line at a great loss.

Fourth. It is conceded, that prior to the receivership, appellant had no mortage security on any of the lines of the Wabash System on which it now claims a lien superior to all mortgages.

Fifth. It is not pretended that appellant has ever had any contractual relations with any of the mortgagees whose security it now seeks to displace.

Surely this is not a case in which restitution should be made to appellant, because it is not a case in which there has been any diversions of its funds. The only diversion shown in the record consisted in taking funds that be longed to the other lines of the system to meet the losses sustained in the operation of the appellant's road.

On what equitable principle, then, is appellant entitled to a lien on the other lines of the system? On what principle is it entitled to more than it has already received? It has contributed nothing towards the payment of the labor and supply claims; it has had its property emancipated from the burden of the labor and

supply debts; it had its road preserved and operated for many months at great loss to the receivership fund; and, finally, it had all its property returned into its possession as soon as it was applied for.

On the foregoing facts it was contended in the court below, as it is contended here, that the appointment of the receivers in some way converted appellant's claim for rental into a receivership debt, and gave it a rank *superior to all mortgages* on the other lines of the system. In passing on that point the Court (Brewer, J.) then said:

"The idea which underlies this bill is that which underlies the action of a voluntary bankrupt under the bankrupt law. Finding himself insolvent he surrenders his property to the court to be disposed of for the benefit of his various creditors. Such action in no manner changes the relative rights of his various creditors. They stand subsequent to this action as they did before, and their various right and equities are determined not by his action in surrendering his property to the custody of the court, but by the terms and obligations of the contracts theretofore entered into. Narrow the question in this way: Suppose A is the owner of a mill and the lessee of an adjacent farm. Having mortgaged both his mill and his leasehold interest, and finding himself insolvent, he applies to the court by bill for the appointment of a receiver to take possession of his property and dispose of it for the benefit of his creditors. Can it be that his action in filing the bill, or the action of the court in appointing a receiver, makes the claim for rental an unsecured obligation, paramount to the secured lien of the mortgage? The proposition will be startling if true. It would put it in the power of a mortgagor to dispossess the vested lien of the mortgagee and render such lien subordinate to unsecured claims.

VI.

The decree ought to be affirmed, because appellant left its road in the hands of the receivers to be preserved and operated by them at a loss, when by the terms of its lease appellant was authorized to take possession of its property at any time after thirty days' default in the payment of its rental.

In the lease made by the appellant to the St. Louis, Kansas City & Northern Railway Company (the Wabash) it was provided (Record, page 16) that if default should be made in the payment of the rent reserved, and the same, or any part thereof, remained unpaid for the space of thirty days from the day on which it become due, appellant might enter upon and take possession of all the property thereby leased, and, at the option of appellant, said lease might be terminated.

In view of the foregoing provision of the lease, it is difficult for us to understand the force of the following paragraph, found on page 30 of appellant's brief. He says:

"When the property passed into the hands of the receivers, appellant's position remained unchanged. It was still bound by the lease. It had neither the right nor the power to exercise a choice. However cogent might have been its reasons for desiring possession of its property, it could not say to the receivers: We will terminate the lease. It was equally precluded from saying to the receivers: We insist that you shall assume this lease and perform its covenants.

But this choice, which was denied to the appellant, did rest with the receivers. They could adopt the lease, or they could repudiate it. If the receivers had decided to repudiate it, and had refused to take possession of and to operate appellant's road, appellant would have been compelled to submit. When they did decide to adopt the lease and to continue the operation of the road, appellant's position was still that of simple acquiescence.

Our position was, therefore, purely a passive one; we had no power nor right to act in either way. Upon the receivers was cast the responsibility of acting. They did act; and appellant, as it was bound to do, submitted."

In all candor we ask: Why and how was the responsibility of saying whether the lease should be continued or terminated *cast upon the receivers*? Having been ordered by the Court to take possession of the road, how could the receivers refuse and "compel appellant to submit," as is asserted. By the very terms of the contract appellant could terminate the lease if its rental was not paid, and not only did the receivers fail to pay the rental, but early in the receivership the Court informed appellant that its rental would not be paid. The Court said it would not take the money that belonged to underlying mortgages to pay rental on non-paying branches. The receivers were mere custodians. As between the parties to the suit they were *passive agents* with no power to act for or against the interests of any one, while appellant was an *active litigant* brought into the suit as a defendant for the sole purpose of being heard in its own behalf. The court was always open for any application it might see fit to make concerning the

custody of its property, or its rights under the lease. Therefore our contention is, that the responsibility of acting rested upon appellant and not upon the receivers.

On that subject the true rule was stated in the opinion of the Court below, where (Brewer, J.) said:

"The lessor was defendant as well as the mortgagee; each knew his rights; each, summoned into court, was at liberty to assert his rights. Neither was told directly or by implication that he would gain ought by the action of the Court in making the appointment. As the mortgagee might come in and did come in asking foreclosure of his mortgage, so the lessor might come, and many did, demanding the surrender of the leased property for non-payment of rent. These very intervenors, after the lapse of some months, came in and asked possession of their property which was promptly surrendered. Why should the mortgagee be compelled to pay the lessor, any more than the lessor be compelled to pay the mortgagee? Each was summoned into court; each was called upon to make a showing of its claim, and each did so in time and manner that suited it Because there were various properties covered by separate mortgages and merged in one system and as such covered by one subordinate mortgage, is there any equitable reason why the Court, seizing upon all the properties at the instance of the common debtor, can be said to have created any new and different equities between these various creditors? Did not each stand upon his legal rights—rights as they existed before the receivership, and rights which could be asserted at any time and were, in fact, asserted as soon as each party saw fit."

The record shows, as stated by the Court, that many lessors and mortgagees did come in and ask for their properties, and that none were refused. That the

Court would have recognized appellant's demand for possession of its road, at any time after default in the payment of its rental, can not be doubted.

Speaking upon that subject the first time the matter was brought fairly to its attention, the Court (Record, page 270) said:

"While the Court will continue to operate such subdivision until some application be made, yet the right of a lessor or mortgagee, whose rent or interest is unpaid, to insist upon possession or foreclosure will be promptly recognized. * * * The disruption, if it comes, will come from those who seek separation and have a legal right to do so."

Under such circumstances it is not sound for appellant to assert that "it was bound by the lease; that appellant could not terminate it, and that the receivers having taken possession of appellant's road, it was compelled to submit." Appellant says its position "was that of simple acquiescence." But on the other hand we say that, being a defendant in the suit, *it was its duty to act* and make known to the Court its rights.

By remaining passive appellant succeeded in getting its road operated for a long time at the expense of the receivership, but we do not see on what equitable principle appellant could, by merely remaining passive, make its claim for rental a lien on all the other lines of the sytem, and that, too, long after it had been informed by the Court that it would get no rent.

VII.

The decree ought to be affirmed, because there was nothing in the conduct of the Central Trust Company and Cheney, trustees, which rendered appellant's claim for rental superior in equity to the lien of the general mortgage on the other lines of the Wabash System.

Attention has been called by counsel for appellant to the fact that the Central Trust Company and Cheney, trustees in the Wabash general mortgage, filed a cross-bill and afterwards an original bill to foreclose the mortgage, and that in those bills they prayed for the appointment of receivers.

It is true that those trustees filed cross-bills and an original bill, in which they prayed for the foreclosure of their mortgage and the appointment of receivers; *but they got nothing by their prayer for a receivership.* From the beginning of the litigation the Court refused to treat the receivership as being otherwise than for the equal benefit of all the parties. The record (pages 271-2) shows that on the 16th day of April, 1885, the the trustees in the general mortgage prayed the Court to extend the receivership over the property covered by their mortgage, and that the Court refused their application. In denying that application the Court, among other things, said:

"The value of any branch abandoned is diminished, and the Court may not consider simply the interests of the consolidated company, the mortgagor, and the trust company, the mortgagee. It is bound to regard the in-

terests of each one of these subdivisions that went into the consolidated company and thus into the receivers' hands. * * * * Furthermore, as receivers appointed at the instance of the mortgagor, in the first instance, they took possession of the entire properties, while this order contemplates a seizure of a part only of these properties—not all. Having taken possession of the road under the idea in the first place that the integrity of the system had a value and should be preserved, it seems to us the receivership should continue right along in that line. There will be no re-appointment of the receivers."

Again, when it come to entering the decree foreclosing the general mortgage, appellant's right to take its road away from the receivers and into its own possession was fully recognized. To make sure on that point the decree (Record, page 305) contained the following acquittance:

"It is adjudged by the Court that the lien of the general mortgage on any leasehold interest or other conditional interest held or owned by the Wabash Company in or to any line or lines of railroad or any property, rights or franchises, shall not be held to impair the right of the lessor or lessees of such line or lines or the person or persons under whom the said line or lines were conditionally held by the Wabash Company to terminate any such lease or conditional interest because of any breach of the terms on which the same was granted to said Wabash Company. The declaration herein of a lien on such property in favor of said general mortgage shall not be held to revive any leasehold or conditional title in said Wabash Company in any interest when the same has been heretofore lawfully terminated or to prevent the future termination thereof for the breach of any condition for which such lease or interest might be otherwise lawfully terminated or forfeited, and in all cases when any line or lines of railroad have been, by order or decree of Court, surrendered to the trustee or trusttees

in underlying and senior mortgages, or to any receiver or person appointed by the Court in whose jurisdiction the property is situated, the said leases under which such line or lines were formerly held by said Wabash Company shall be and are hereby adjudged and decreed to be lawfully terminated."

Not only was the foregoing provision inserted in the decree, but on the 9th day of April, 1886, (Record, page 198) appellant applied to the Court and received from it an order directing the receivers to surrender the possession of its road.

On those facts it was contended in the court below that by filing the cross-bill and asking for the appointment of receivers, the trustees in the general mortgage had subordinated their rights to appellant's claim for rental. But the Court took a different view of the question. In its opinion the Court (Brewer, J.) then said:

"It is true that after the appointment of a receiver the mortgagee came in with an application for a foreclosure; but the assertion of his rights to a foreclosure was not different from that of the assertion of the lessor to his claim for rent. Each took what rights were given him by his prior contract, and neither by his action waived any of his rights or consented to a subordination of his priority. It is true, also, that the holder of the general mortgage prayed the Court to extend the receivership over that part of the property conveyed to it as a mortgagee. Perhaps if that application had been granted some different question might now arise; but the Court expressly decided against the application, leaving the receivership to stand as it was in the first instance—one granted on the application of the mortgagor, and one whose appointment it was believed would in no manner change the relative right of any creditor."

Precisely the same conclusion was reached in the case of the Central Trust Company vs. Wabash etc. Ry. Co. —Swayne intervenor (46 Fed. Rep. 26). In that case the Court (Woods, J.) held:

"When an insolvent railroad company upon its own petition procures the appointment of receivers to take possession of its road and leased lines, and in the same suit trustees of a mortgage upon the property ask and are denied an appointment of receivers or an extension of the receivership under their cross-bill, but obtain a decree of foreclosure and sale of the property thereon, the rentals of the leased lines while in the possession of the receivers do not become a charge upon the corpus of the property to be paid in preference to the mortgage debt."

What was held by the Court below in this case, and what was held by Judge Woods in the case of Swayne intervenor, was in perfect harmony with what was decided by this Court in the case of Kneeland vs. American Loan Company (136 U. S. 89).

In that case a company that owned a railroad subject to prior mortgages acquired rolling stock on which it agreed to make certain rental payments. The railroad company afterwards became insolvent, and at the instance of a general judgment creditor a receiver was appointed who took possession of both railroad and rolling stock. The trustees in the mortgages were made parties to the bill under which the receivers were appointed and entered their appearance, but they neither objected nor consented to the appointment of the receivers. Under those circumstances the owners of the

rolling stock contended, that as their property had been taken possession of and used by the receivers, their claim for such use became a lien upon the railroad superior in equity to the mortgages.

The Court held, however, that so long as the receivership established at the instance of the general creditor continued, the claim for the use of the rolling stock could no more be charged as a lien against the railroad than the claim for the use of the railroad could be charged as a lien against the rolling stock. On that subject the Court then said:

"Neither lienholder asking the aid of the Court, no obligation was assumed by either in respect to the management of the property as against the other. If the operation of the property seized by the receiver did not result in the payment of the operating expenses, and the common debtor was unable to pay, the burden of the deficiency is as properly cast upon the holder of a lien upon the personalty as upon the holder of a lien upon the realty; and when the Court, in the administration of the receivership, thereafter returns the personalty to the holder of the liens upon it, such lienholder must be content to be relieved from any burden for a *pro rata* share of the deficiency, and has no equity to claim that he shall be not only thus relieved, but that he may also charge upon the realty, to the detriment of the lienholder thereon both the entire burden of the deficiency and compensation to him for the use of his property. Hence it follows that neither by reason of a contract of purchase of the rolling stock, nor by its use for four months at the instance of a general creditor, was any burden cast upon the holder of a lien upon the real estate for the non-payment of such contract price or the rental value."

In the foregoing paragraph the Court defined the rights of the parties as against each other, so long as the receivership, established at the instance of a general creditor, continued. But, later on, that receivership was terminated and one was established at the instance of the trustees in the mortgage resting on the railroad, and when the receivers, appointed at the instance of those trustees, began to use the rolling stock to make money for their bondholders, the Court held that the trustees and the bondholders for whose benefit the rolling stock was used, ought to pay a reasonable compensation for its use.

In the case at bar there was never any change in the character of the receivership. The one established at the instance of the Wabash Company, the common debtor of all the defendants, continued to the end. To that receivership the trustees in the general mortgage neither consented nor objected. That receivership was not for their benefit any more than it was for the benefit of appellant, and there never was a time when the net earnings of appellant's line would not have been given to it, if not required by the receivers to pay the preferential indebtedness resting alike on all the lines.

WELLS H. BLODGETT,

For Appellee.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

ST. JOSEPH & ST. LOUIS RAILROAD COMPANY,
APPELLANT,

vs.

SOLON HUMPHREYS & THOMAS E. TUTT,
RECEIVERS.

No. 287.

REPLY TO BRIEF OF APPELLEES.

EVERETT W. PATTISON,
Attorney for Appellant.

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Supreme Court of the United States.

OCTOBER TERM, 1891.

ST. JOSEPH & ST. LOUIS RAILROAD COMPANY, APPELLANT, *v.* SOLON HUMPHREYS AND THOMAS E. TUTT, RECEIVERS.	No. 298.

Reply to Brief of Appellee.

It is proper to refer briefly to a few points made in appellee's brief, lest by our silence we should be deemed to have assented to their correctness.

I.

On page 25 of his brief counsel for appellee makes the assertion, which is more than once repeated in one form or another, that it was alleged in the bill of complaint filed by the Wabash Company "that the receivership was "in the interest of, or would be beneficial to, the leased "lines." We have made a most careful and painstaking

examination of the bill and can find no such allegation. I trust counsel will in his oral argument point out the page and lines where this allegation is to be found.

II.

As will be seen by references to pages 12–15 of our original statement, we differ from counsel for appellees as to the construction of the petition filed by the receivers on June 26, 1884, and the subsequent order of June 28, 1884 (Record, pp. 246 and 255). We insist that both petition and order necessarily embraced appellant's road, and that its effect is as stated by us in our original argument.

III.

It is intimated, rather than asserted, in the brief filed by appellee, and was distinctly stated by counsel for appellee in oral argument in the Quincy case, that we have misinterpreted the language of the order as to payment of rentals. They urge that the words "or otherwise," on page 239 of the record, should be limited so as to cover only income. They would paraphrase this part of the order as follows: "Out of income derived from the operation of the road or derived from other sources."

If it had been the intention of the circuit court to confine the payment of rentals to the fund derived from income, it would have been easy to so express that intention as to place it beyond doubt. This was done in the next succeeding paragraph of the order (p. 240). On the other hand, if the intention were to provide for the absolute payment of the rentals, without regard to the source from which the money to pay them should come, there is no question that apt words have been used to express that

intention. It would be difficult to choose words that would express such intention more clearly than those used in the order.

If there is any ambiguity in the order, it should be construed most favorably to the appellant, since it had no part or voice in framing it.

It will be conceded, too, that the language of the order must be construed in the light of the allegations and prayer of the bill. Applying this rule, it seems clear that there could have been no intention to limit the sources from which the money was to be derived to pay the rentals. For—

1. The bill does not disclose any source of income other than the operation of the road.

2. The bill discloses (Record, p. 230) that its main object was to prevent the lessors from forfeiting the leases.

3. In its prayer complainant asks among other things for a decree that the entire property be sold, "and that *the proceeds arising from the sale* of such property be applied under the orders and decrees of this Court according to the rights, interests, and equities of parties or persons interested in said fund" (Record, p. 232).

4. On page 233 it further prays "that such orders be made as to enable such receiver or receivers *to raise money* with which to *pay all rentals* accrued or accruing," &c.

IV.

Counsel for appellees adroitly seeks to avoid the true issue in this case by presenting the question as if it were one between the different divisions of the Wabash system. Thus he says on page 35 of his brief:

"There could be no just reason for saying that one line was being operated for the benefit of another line, or for

saying that the earnings of one division should be taken to satisfy the mere contract obligations of the Wabash Company to another division."

Again, on page 36, he says:

"But when it came to taking the earnings of one line to pay interest or rentals due on another, a different question was presented, because no one line or division had superior claims upon the earnings of any other."

And in the last paragraph on the same page:

"On what equitable principle should the burden of paying the rental due to one line have been saddled upon another?"

And so he continues, page after page, to the same effect.

But we decline to be diverted in any such manner from the true issue. The question here is solely between appellant on the one hand and the holders of the general mortgage bonds and the Iron Mountain Company, the mortgagees in the indemnity mortgage, on the other. We are not seeking to take the money which belongs to other subdivisional roads, or to the underlying mortgagees. We are asking that the rent which accrued while our road was in the hands of the receivers be paid before anything is paid to the above-mentioned two mortgagees—that it be paid as a debt incurred by the receivers, and like any other indebtedness of the receivers. (See pages 45–52 of our original brief.) We are asking that the terms of the final decree and order of sale be complied with. (See our original Statement, p. 27.)

And in this connection we desire to note that even if the language used by the circuit court and which appears on page 277 of the record could be held binding on appellant, who was neither notified nor present, yet that language would

only have told appellant that the court had concluded that income should not be taken from one branch to be given to another—a thing we have never asked the court to do. The court below did not say to appellant, did not say to any leased line, so far as we are aware, that the rentals would not be held to constitute a preferential debt, so far as the general mortgage and the indemnity mortgage were concerned. Its language on page 271 of the record, and on other occasions, contains a plain intimation that the rights of the lessors would be respected as against those mortgagees. In the final decree dismissing our intervening petition, the court below considered and passed upon this question for the first time.

V.

A good test of appellant's rights in this matter is afforded by a reversal of the question at issue. Suppose the receivers had paid our rent promptly and in full, and it became to our interest to withdraw the property from the possession of the receivers. Does it admit of question for a moment that, no matter how strong might be such desire, we should utterly fail to accomplish it? There can be no doubt that the receivers would in that case have been entitled to hold the property as against us, so long as they continued in office, and that they would have had the right to sell the leasehold as a part of the assets of the mortgagor, and the purchaser under the mortgage would have taken a title which we could not have gainsaid. Now, can it be conceived that a court of equity will hold that the situation is purely a one-sided one; that while the receivers complied with the terms of the covenant we were powerless to change the status, but that the receivers had it in their power to change the status as against our interests

and our rights? Is there any equity in holding that the receivers could retain our property and not pay rent for it when we seek to hold them to the contract, while we would have been powerless to have prevented them from retaining the property if they had seen fit to perform the contract? It would seem that the only equitable view is that taken by this Court in *Sunflower Oil Company* v. *Wilson* (142 U. S. 322), where it says, speaking through Mr. Justice Brown, that a receiver taking leased property must pay "the stipulated rental for it so long as he used it."

It is respectfully submitted that the decree of the court below should be reversed, and that the circuit court should be ordered to enter a decree allowing, as a claim against the receivers, the full amount of the accrued rent.

EVERETT W. PATTISON,
For Appellant.

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JAMES H. McKE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM NO. 287.

THE ST. JOSEPH AND ST. LOUIS RAILROAD COMPANY, APPELLANT,

vs.

SOLON HUMPHREYS AND THOMAS E. TUTT, RECEIVERS OF THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

ADDITIONAL BRIEF FOR APPELLEES.

THOMAS H. HUBBARD,
For Appellees.

C. G. Burgoyne, Walker and Centre Sts., N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM NO. 287.

THE ST. JOSEPH AND ST. LOUIS RAILROAD COMPANY, *Appellant*,

VERSUS

SOLON HUMPHREYS and THOMAS E. TUTT, Receivers of the Wabash, St. Louis and Pacific Railway Company.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

ADDITIONAL BRIEF FOR APPELLEES.

STATEMENT.

The appellant's statement imports some facts that are controverted by the appellees.

It conveys the idea that the Saint Joseph Railroad was

profitable or of benefit to the Wabash system; that the Saint Joseph Company was helpless, passive or defenseless; that the Receivers elected to take and hold said railroad under the lease; that the Court promised to pay rental for its use and that the mortgagee of the "general mortgage" assented to the payment or the promise.

On these subjects the record refutes the appellant's views:

1. Was the road profitable?

The appellant says (p. 12, Appellant's Brief):

"So far from intimating any desire to give up the road, "or that any necessity for such course existed, they," the Receivers, "made known to the Court below, on June 26, "that its operation was proper and advantageous. On that "day they filed a report wherein they stated that they had "made thorough investigation of the condition, earning "capacity, etc., of the system as a whole and in its various "parts. * * *

"This report will be found on pages 246–255 of the "record. After giving in detail the classes and amounts of "coupons which had already matured, or which were about "to mature, on the various underlying mortgages of the "Wabash system, the Receivers made this important state-"ment: 'Your petitioners further state that they are advised "'and believe that each and all of the aforesaid lines of rail-"'road which were owned or controlled either by the Wabash "'Railway Company or by the St. Louis, Kansas City and "'Northern Railway Company before their consolidation in "'1879 * * * have at all times during the five years "'last passed, or ever since their construction, earned more "'than enough to pay all their operating expenses, the cost "'of maintenance and interest upon the several series of "'bonds above described and respectively secured upon them "'by the mortgages or deeds of trust aforesaid' (Record, p. "251). The significance of this admission consists in the fact

" that appellant's road had been for ten years prior to the " receivership a part of the St. Louis, Kansas City and " Northern Railway Company; and in this report there is " not only no intimation that it had been a burden to its " lessee, but there is a distinct statement that the latter had, " as a whole, earned more than enough to pay its operating " expenses, cost of maintenance and interest upon its " bonds."

The brief then mentions ten lines of road referred to in the report as non-paying, and continues as follows:

" From the fact that appellant's road was not included in " the list, it is apparent either that our road was operated at " a profit, or, if it were not, that the Receivers considered it " of too much importance to the system to be surrendered. " And in this connection it is important to note the para- " graph of the report which follows that last quoted and " which reads as follows: 'Your petitioners further state " that, from the incoming rents and profits of the property now " in their possession under a former order of this Honora- " ble Court, they believe they can, until otherwise directed, pay " all the expenses of operating the same, the cost of mainte- " nance and all interests from time to time maturing on all " bonds and other obligations secured by mortgage or deeds " of trust on the several lines or divisions thereof that were " owned or possessed either by the Wabash Railway Com- " pany or by the St. Louis, Kansas City and Northern Rail- " way Company before their consolidation' (Record, p. 254). " Thus the Receivers solemnly declared, that not only was " appellant's road not a burden to the system, but that they " were able to pay its rental" (Appellant's Brief, pp. 13, 14).

An attentive reading of the record shows that the view expressed in the appellant's brief is wholly erroneous.

The Saint Joseph road is not mentioned in the petition of June 26, nor in the Master's report thereon (Record, pp.

246–255). The Receivers did not state, as asserted in appellant's brief (p. 12), "that they had made a thorough investigation of the condition, earning capacity, etc., of the system as a whole and in its various parts." The Receivers did not admit, as the appellant supposes, nor did they state, by reference or implication, that the Saint Joseph road was operated at a profit, or was of too much importance to the system to be surrendered, or that they were able to pay its rental.

They did not state, nor did the Master find, as the appellant asserts (Appellant's Brief, p. 14) that the lines of railroad which composed the St. Louis, Kansas City and Northern Railway Company at the time of the consolidation, had ever since the consolidation earned more than enough to pay all their operating expenses and fixed charges. *There is no statement or reference either in the Receiver's petition of June 26th, or in the Master's report thereon, which includes the appellant's road.*

The appellant's counsel has fallen into error of fact from a partial or inexact reading of the Receiver's petition, and evidently supposes that the words quoted therefrom, to wit, "that each and all of the aforesaid lines of railroad which were owned or controlled either by the Wabash Railway Company or by the St. Louis, Kansas City and Northern Railway Company" (p. 12, Appellant's Brief), have the same force they would have had if the word "aforesaid" were omitted, and that the words quoted include all the lines which were a part of the St. Louis, Kansas City and Northern Railway.

As matter of fact the words quoted are from page 251 of the record, and are only made intelligible by reference to page 247, from which the appellant has not quoted.

On page 247 the Receivers state that the Wabash Railway Company and the St. Louis, Kansas City and Northern Railway Company, at and before their consolidation, were "possessed of certain valuable lines of railroad in the States of Missouri, Iowa, Illinois, Indiana and Ohio, but which were held by them subject to mortgages and deeds of trust, previously executed to secure certain bonds and obligations, to wit:" Then follows a specification by name of the lines on which the bonds and obligations in question rested (pp. 247-250). *The appellant's road is not one of them, nor does the petition purport to specify all the lines of the two consolidating companies.*

Then follow (p. 251 of Record) the words quoted in appellant's brief. *These words, by the use of the word "aforesaid," point to the lines of railroad specified by name and to no others. The appellant's line was not one of these.*

The appellant has fallen into a similar error in respect to the Master's report.

What the Master reported is: "And I further find that all the lines of railroad that were owned or controlled either by the Wasbash Railway Company or by the St. Louis, Kansas City and Northern Railway Company, *and which are hereinafter mentioned*" (p. 256 of Record). And the Master proceeds *to mention by name* the lines with which he is dealing. *The appellant's line is not one of them.*

What the appellant supposes the Master reported is "that

the lines which composed the St. Louis, Kansas City and Northern Railway Company" had earned, &c. (Appellant's Brief, p. 14). The appellant construes the Master's report as if the words "*and which are hereinafter mentioned*" were not to be found in it.

The appellant has also fallen into an error of fact in stating (p. 20 of Appellant's Brief): "It thus appears that on February 11th, 1885, or nearly five months after the Receivers had taken possession, they asserted for the first time the belief that appellant's road did not pay its operating expenses, and set this up as furnishing a sufficient reason why our intervening petition should be overruled.

In making this statement the appellant overlooked that part of the record which shows that in October, 1884, the Receivers gave to the appellant official notice that they would be unable to pay rental (Record, p. 118, last line of page), and that the appellant's president, Mr. Nesbit, said that he had already had some conversation with Mr. Humphreys (one of the Receivers), who had made the same statement to him (Record, p. 119).

A more startling error of fact appears at page 21 of appellant's brief. It is as follows. The appellant says:

"There is one fact that has a somewhat important bear-
"ing here. The system, in its entirety, was operated at a
"loss, and the Receivers claimed that appellant's road was a
"burden to the system, and that they were unable to operate
"it without incurring a deficit. But the evidence shows
"that in 1883, the year before the property passed into the
"Receivers' hands, appellant's road was run at a profit, and
"it further shows that the gross earnings of the road after it

" went into the Receivers' hands were greater than they had " been during any portion of the anterior period.

" On pages 171 and 172 of the record is a statement made " by the officers of the Wabash Company to the Railroad " Commissioners of the State of Missouri, for the year 1883, " from which it appears that appellant's line was operated " at a cost of $1,432.20 per mile, while its earnings were " $2,210 per mile; its operating expenses being only 64.8 " per cent. of its earnings."

The appellant's brief then gives (p. 22) a statement of gross earnings of the road while operated by the Receivers, for the purpose of raising an inference that, as the road "*was run at a profit*" in 1883, it should not have been run at a loss in the later years, when gross earnings were larger.

When we search the record to find the *alleged profit* from operations of 1883 the following facts appear:

It does appear that the gross earnings of the road in 1883 were reported at $2,210 per mile, and a total of $168,402.85 (Record, p. 171).

It does appear that the operating expenses of the road in 1883 were reported at $1,432.20 per mile, and a total of $109,178.10. This shows $64\frac{8}{10}$ as the per cent. of operating expenses, and $59,224.75 as the excess of gross earnings over operating expenses (Record, p. 172).

And here the appellant pauses in its statement of the fact.

But here does not pause the record nor the report to the Railroad Commissioners.

For on the same page of the record, and as part of the same report to the Railroad Commissioners (Record, p.

172), it appears that the cost of renewals and repairs for the road in 1883 was, for materials $47,445, and for labor $24,098.75, a total of $71,543.75. This absorbs the excess of gross earnings over operating expenses and leaves a debit balance of $12,319.

Thus it appears that when the appellant asserts that the road was "*run at a profit*" in 1883, the meaning is that the *profit* can be figured by disregarding all charges for repairs or maintenance, and that if these are taken into account the *profit* turns into a *deficit*.

It seems, therefore, that there is manifest error of fact in the appellant's statements about the profits of the road.

What the record really shows is, that the Receivers alleged they had incurred a loss of $51,180.09 by operating the road from May 29, 1884, to November 30, 1884 (Record, p. 26), that the special Master found that the operation of the road was a burden to the rest of the property in charge of the Receivers (Record, p. 37); that he also found that the road had been of no benefit to the system in the hands of the Receivers, and was neither necessary nor valuable to the Wabash system as a feeder (Record, p. 43); that its expenses exceeded its earnings (Record, pp. 45, 117); that it was insolvent before the lease was made (Record, p. 55); that the Receivers did not neglect it, but cared for it with good judgment (Record, pp. 113, 139, 147, 158); that its deficit from May 29, 1884, to June 30, 1885, was $71,207.36 (Record, p. 186); and that the deficit continued and increased to the time the road was turned over by the Receivers in 1886 (Record, p. 207).

2. Was the situation of the appellant a defenceless, helpless or passive situation ?

The appellant's assertions on this subject are found at pages 30 and 31 of its brief, and are mingled statements of fact and argument. The appellant says :

" In making application of the legal principles governing " the question involved in this appeal, it is important to " keep in mind that on May 29, 1884, only one of the parties " to our lease was clothed with the right and power to " exercise a choice as to its future status. The application " for the appointment of Receivers found appellant in the " position of a lessor which had surrendered to its lessee all " its property for a fixed term. If the Wabash Company " had continued to be a going concern, that company would " have been bound to pay appellant its rents until the end " of that term. On the other hand, there was no way by which " appellant could have terminated the lease or recovered " possession of its property, so long as the covenants of the " lease were observed by the lessee. *When the property passed* " *into the hands of the Receivers appellant's position remained* " *unchanged. It was still bound by the lease. It had neither* " *the right nor the power to exercise a choice.*

" *However cogent might have been its reasons for de-* " *siring possession of its property, it could not say to the* " *Receivers, ' We will terminate the lease.' It was equally* " *precluded from saying to the Receivers, ' We insist that you* " *' shall assume this lease and perform its covenants.' But* " *this choice, which was denied to the appellant, did rest with* " *the Receivers. They could adopt the lease or they could re-* " *pudiate it. * * * Our position was therefore a purely* " *passive one ; we had no power or right to act in either way.* " *Upon the Receivers was cast the responsibility of acting.* " *They did act, and the appellant, as it was bound to do, sub-* " *mitted* (Appellant's Brief, pp. 30, 31).

The passages here quoted are not italicised in the brief,

but it seems necessary here to lay stress on words which indicate an oversight of what the record discloses or a lapse in the processes of appellant's argument.

The record discloses, that by the terms of the lease a default in the payment of rental continued for thirty days, or a failure on the part of the lessee to "keep and observe all and every the covenants, stipulations and agreements" in the lease contained, should entitle the lessor to enter upon and take possession of the leased property, and at its option to terminate the lease; provided, only, that the lessor should give notice of the breach complained of and require that said breach be remedied within three months, and without such notice should not re-enter or forfeit the lease for any breach of covenant except the covenant to pay rent (Record, p. 16).

The record also discloses that one of the covenants of the lease was "that this lease shall not be assignable, nor shall the demised premises or any part thereof be underlet to any one, without the written consent in either case of the 'lessor,' signed by its president and countersigned by its secretary, and authorized by a resolution of its Board of Directors, and any attempted assignment of this lease, or contract of subletting on the part of the 'lessee' without such written consent first had and obtained, shall work a forfeiture of this lease" (Record, pp. 17, 18).

The record also discloses that the Receivers were appointed on a bill filed by the Wabash Company of its own motion (Record, pp. 224, 239), which declared its own insolvency

and its inability to pay its debts and rentals (Record, p. 230).

In the language of the Circuit Court, "the idea which underlies this bill is that which underlies the action of a voluntary bankrupt under the bankrupt law" (Record, pp. 214, 215).

The record also discloses that after default in payment of rent it was stated in open court, and does not appear to be controverted, that the appellant chose to rest in that condition and was unwilling to take its property; that the Receivers, if called on for an expression of their opinion would advise that it would be wiser to cancel the lease (Record, p. 261); and that the Court so far from considering that the Receivers had the right or power to decide what to do, and so far from considering that the lessor was bound to submit to such decision, recognized the lessor's right to decide, and said: "The lessor may come in and say, I wish you to continue to do what you contracted to do for my line, and operate that road. You say you cannot do it. Well, what will the lessor do—hold you to your contract, or what (Record, p. 262)?"

And, again the Court said: "It," the lessor, "may insist upon the validity of its contract and insist upon that contract as a contract which is still binding, or it may say, 'We consent to a surrender of the lease, the abrogation of it upon certain terms, and in that way avoid any further responsibility.' We are disinclined to act until there is a specific notice, so that the road itself

the lessor, and the parties interested can say, 'We have notice of this proposition'" (Record, p. 263).

The record also indicates that the lessor well understood it had the right to act, but did not wish to take possession of its property.

On November 25, 1884, it filed a petition, not for possession of its property, but for payment of rental (Record, p. 2).

This petition contains allegations that the road "is absolutely necessary to the proper and profitable operation of the Wabash, St. Louis and Pacific Railway;" that it "is a most valuable feeder to the main line of the said" last-mentioned railway (Record, pp. 10, 11); that said Wabash, St. Louis and Pacific Company had acquired at St. Joseph terminal facilities and an interest in the Union Depot which would be of no use or advantage to it if it should be deprived of the use of petitioner's (lessors's) road (Record, p. 8). This petition is framed not so much with the aspect that the lessor was an humble instrument in the hands of the Receivers as with the view that it might elect to take its property, but preferred to attempt making the Receivers pay it rent. And it does not indicate so much an opinion that the Receivers are thus committed to the terms of the lease or the payment of rental, as a desire to persuade the Court that it would be a wise and beneficent measure to authorize or order the Receivers to commit themselves for the future.

It may be well to note also that the Receivers at once took issue upon the claim that they should pay rental.

3. Did the Receivers elect to adopt the lease ?

It is asserted and reiterated throughout the appellant's brief that they did.

So far as these assertions rest on a legal argument they may, for the moment, be passed by.

So far as they are statement of facts they are controverted by the appellees.

The Receivers made no election when they first went into possession under the order of May 27, 1884.

The Wabash, St. Louis and Pacific Company, in its bill on which that order was made, prayed that, for "the protection of the interests of all concerned and to prevent a great multiplicity of suits," the Court would appoint one or more Receivers and empower and direct them "to take possession of said entire property, and to preserve, operate and manage and control the same" (Record, p. 232).

The order was make as prayed (Record, p. 239), and the Receivers acting under it could at the outset do nothing less than to take possession of all the property.

The record shows that, as soon as the Receivers could get up the accounts of earnings and operating expenses so as to form an intelligent opinion of what was due to a proper administration of their trust, they gave the appellant official notice that they would be unable to pay the rental, and that the appellant's president said he had already been told the same thing by Mr. Humphreys, one of the Receivers (Record, pp. 118, 119, 146).

When, afterwards, the appellant petitioned for rental

(Record, p. 12) the Receivers answered that the expenses of this road exceeded its earnings; that its operation caused a daily heavy outlay far in excess of income and that it would be manifestly unjust to take the earnings of other branches of the system for the payment of this rental (Record, p. 26).

Afterwards the Receivers informed the Court that they would think it wise to cancel the leases and that the lessor was unwilling to take its property (Record, p. 261).

By order of Court notice of a hearing on this subject was served on appellant (Record, p. 267).

On the hearing the Court announced that, where subdivisions earned no surplus, no rent or subdivisional interest would be paid; that the Court would continue to operate such subdivisions *until some application was made*, and that the right of a lessor or mortgagee whose rent or interest was unpaid, to insist upon possession or foreclosure, would be promptly recognized (Record, p. 270).

The Court also announced that the extent of the operation of the appellant's road, which failed to pay operating expenses, should be reduced (Record, p. 271).

The record negatives the idea that the Receivers at any time adopted the lease or elected to be bound by its terms, as matter of fact, whatever may be said as to the legal liability.

4. Did the Court promise to pay the rental?

The appellant states the order of May 27th, 1884, under which the Receivers were appointed, as if it were an abso-

lute order to pay rental—from income, if there were income, but to pay it "otherwise" if income were lacking. The words "or otherwise" are italicized in the brief, and the punctuation of the record is not followed (Brief, p. 6; Record, p. 239).

In the argument the appellant insists that this order was an unqualified promise to pay rental.

On page 50 of the appellant's brief the argument is put in the following words:

"It will be observed that in the order of May 29th" (May 29 is the date of the order as modified in respect to the Receiver's bond) "the Court did not limit the fund out of "which the rent was to be paid to the income. The direc- "tion is to pay out of the income or otherwise."

On page 65 of appellant's brief is found the following:

"What we do insist on is that the Court plainly told us "that all our legal claims should be paid and that we were "fully warranted, both by the orders of the Court and the "acts of the Receivers, in expecting that all our legal claims "would be paid."

At page 70 of appellant's brief is the following, viz.: "We had been told, as plainly as language could convey the information, that our road would be operated by the Receivers and our rents paid by them."

The appellees submit that the view thus presented is a perverted one.

The context of the order shows plainly that the direction was for payment from income only. It was from income derived from the operation of the road or derived from

other sources. The language and the punctuation of the order are as follows, viz.:

"It is further ordered that the said Receivers, out of the "income that shall come into their hands from the opera- "tion of said railroad or otherwise, proceed to pay all bal- "ances due or to become due to other railroads or transpor- "tation companies on balances growing out of the exchange "of traffic accruing during six months prior hereto.

"That said Receivers also in like manner pay all rentals "accrued or which may hereafter accrue upon all leased "lines of said complainant." * * *

"That said Receivers also pay in like manner, out of any "incomes or other available revenues which may come into "their hands, all just claims and accounts for labor, supplies, "professional services, salaries of officers and employees "that had been earned or have matured within six months "before the making of this order" (Record, pp. 239, 240).

The order made June 28, 1884, confirming the Special Master's report on the petition of June 26 (Record, pp. 255–260), by which interest payments were directed where the roads mortgaged to secure interest earned enough to pay it, and by which separate accounts were ordered to be kept in the case of certain non-paying lines; the language of the Court in October, 1884, when it said, "I am not going to take the money that belongs to the underlying mortgages to pay interest on non-earning branches," and "I am not going to sit here and order that the earnings that belong to other branches in this consolidated system shall be taken to pay concerns that don't earn running expenses (Record, p. 277); the decision of the Court, April 16, 1885, already cited (Record, pp. 270, 271)—show a policy consistent with the

terms of the original order of May 27, 1884, that rentals should be paid out of income where there was income, and should not be paid where there was no income.

The petition of June 26, 1884, showed that income for many lines was lacking. The appellants should have known their line earned no surplus. They were distinctly so informed in October, 1884, or earlier (Record, pp. 118, 119).

The record shows that the net earnings of the whole system while in control of the Receivers was less by millions than the existing preferred debt at the time of their appointment. The situation and the language of the order of May 27th are inconsistent with appellants' claim that the Court had promised the payment of this rental.

5. Did the mortgagee assent, either directly or by implication, to payment of rental or a promise of its payment?

In its brief the appellant says it appears from the bill of the Wabash, St. Louis and Pacific Railway Company that notice and a copy of the bill were served on the trustees in the general mortgage before the bill was filed; and, furthermore, that "in their cross-bill the trustees alleged that they had intended and proposed to file a bill for the foreclosure of the mortgage and for the appointment of Receivers, and would have done so had they not been anticipated by the Wabash Company" (Appellant's Brief, p. 5).

The appellant does not quite accurately state the purport of the cross-bill. The allegation referred to was that the

trustees intended and proposed to bring their bill of complaint for the foreclosure of the general mortgage and to protect the rights and interests of the holders of the bonds secured thereby "*so soon as default should be made in the performance of the terms and conditions of said mortgage.*"

The allegations and prayer of the cross bill are directed to the appointment of a Receiver under the application of the general mortgage trustees, and in a proceeding where those trustees would be *domini litis* (Record, pp. 241, 242):

The appellant says (p. 6 of Appellant's Brief):

"That part of the prayer asking the appointment of Re-
"ceivers under the cross bill was refused by the Court on
"the ground that it had been already substantially granted."

What the Court said to that part of the prayer was, "Oh, no; that is an application I shall pay no attention to at present" (Record, p. 243).

Again, when the application was renewed, the Court said:

"I confess I do not wholly understand why such an order
"as that is asked, and I cannot appreciate what counsel
"mean when they say, make the Receivers Receivers for the
"trust company, the mortgagee. As we look upon it, the
"Receivers are not Receivers for either party; they are
"simply the hand of the Court. In the process of the
"litigation the Court has taken possession of the property
"and holds it neither for the mortgagor nor the mortgagee
"and it matters not for the ultimate determination of the
"suit at whose instance the Receivers were appointed. They
"act for neither party. They represent neither party. They
"stand here simply as the hand of the Court, holding the
"property for disposition at the end of the litigation for
"the benefit of all. * * *

"*Furthermore, as Receivers, appointed at the instance of*
"*the mortgagor, in the first instance, they took possession of*

" *the entire properties, while this order, as tendered, contem-*
" *plates a seizure of a part only of these properties, not all.*
" *Having taken possession of the road under the idea, in the*
" *first instance, that the integrity of the system had a value,*
" *and should be preserved, it seems to us the receivership*
" *should continue right along in that line. There will be no*
" *reappointment of the Receivers* " (Record, pp. 272, 273).

This failure of the trustees to obtain the appointment of a Receiver under their bill upon an order which, as the Court said, contemplated " a seizure of a part only of these properties, not all," the appellant chooses to treat as an assent to the appointment of Receivers under the Wabash bill, and argues that it is an assent to the payment of rental because the order of May 27 expressly directed the Receivers to pay rentals (Appellant's Brief, pp. 15, 16). The error of the appellant's statement in respect to this supposed order to pay rentals has already been shown.

The appellant states, as argument derived from this supposed assent, " Our case was, therefore, from its inception, of the same character as the Kneeland case became after the cross-bill was filed by the mortgagees " (Appellant's Brief, p. 58).

But in the Kneeland case the prayer of the mortgagee for the appointment of a new Receiver *was granted* (Appellant's Brief, p. 56). Here it *was refused*. There the mortgagee of real estate asked the Court to take possession also of personal estate (rolling stock) not covered by its mortgage, and on this request the Court appointed a Receiver of all the property, both real and personal (Appellant's Brief, p. 58). The facts which controlled the decision in that case do not exist in this.

POINTS.

I. The appellant's claim is for a sum it never earned; is asserted against parties who never contracted to pay it and is a demand for the present creation of a first lien or charge upon property never dedicated to its payment, but already mortgaged to others.

II. The appellant could have applied for and obtained its road when the Receivers were appointed; but it elected to leave it in the hands of the Receivers subject to the terms of the receivership.

III. The Special Master correctly found and the Court correctly decided that the appellants' claim for rental is an unsecured debt of the Wabash, St. Louis and Pacific Railway Company and not a charge upon the corpus of the receivership property.

IV. The claim cannot be sustained on the ground that any act of the Receivers, or of the mortgagees, has made it a charge upon the corpus of the receivership property.

V. The claim cannot be sustained on the ground that any act, or order, of the Court, has made it a charge upon the corpus of the property in preference to existing liens.

VI. In this case none of the grounds exist which have been recognized by courts of equity as sufficient to charge the corpus of receivership property and displace or defer mortgage liens thereon.

VII. The argument that this claim is entitled to priority as a receivership debt is not well founded.

BRIEF.

I. The appellant's claim is for a sum it never earned ; is asserted against parties who never contracted to pay it and is a demand for the present creation of a first lien or charge upon property never dedicated to its payment, but already mortgaged to others.

(a) The urgency with which the appellant has striven to show that its road was profitable, or a benefit, or an advantage to the other roads held by the Receivers, proves the appellant's sense of the lack of equity in its claim. If the road were profitable in itself, then the appellant could urge that, its demand was for payment from its own earnings. If it, were indirectly an advantage or a benefit to the other roads, then the appellant could urge that they had received an equivalent for the burden it would put upon them. The proofs, as already demonstrated, fail to support this part of the appellant's contention. The record is against it. The evidence and the Master's findings are all the other way.

Since, then, the claim cannot be paid from earnings of appellant's road, and cannot be supported as a just claim by any consideration of benefit or advantage derived indirectly from the use of that road ; since the proofs showed that its operation was a burden and a loss to the other roads against whom is it to be enforced and from whose money or property is it to be paid, if paid in any way ?

(b) It is not asserted against the Wabash, St. Louis and Pacific Railway Company, as successor to the original lessee. The Master has found that it is a valid unsecured claim against that company, and the appellant has excepted to the finding (Record, pp. 38, 40).

It is not asserted against the original lessee, the St. Louis, Kansas City and Northern Railway Company, although the appellant asserts "that lessee is to-day in a solvent condition and, as the record shows has always been able to pay its fixed charges, the interest on all its bonds and our rental" (Appellant's Brief, p. 87). If this assertion be correct it would seem that the appellant might have a remedy at law upon its contract.

But in fact the claim is asserted against the Receivers who within a reasonable time after their appointment, gave notice to the appellant that they would not pay it (Record, pp. 118, 119); who have contested it ever since it was asserted and who, if they are under any obligation in respect to it, have become so, not because they have contracted, or intended to contract, with respect to it; not because they have received any equivalent for it; but because having already spent more than seventy thousand dollars for the benefit of appellant, without any return, they are now to be impaled upon the technical point that, by taking possession of the road May 29th, 1884, as ordered by the Court, they became assignees of the lease.

(c) The money or property from which the appellant wishes its claim paid is that which has been mortgaged to

others to secure valid claims, and has never been mortgaged or dedicated to secure this claim.

Since the net income of the whole Wabash system, from the beginning of the Receivership to the time when the St. Joseph road was surrendered, was $1,598,360 less than the preferred debt paid by the Receivers under order of the Court (Record, p. 314), and since the Receivers were obliged to issue certificates, it is obvious the appellant's claim cannot be paid from income. And since the property sold for only a fraction of the sums due on the mortgages under foreclosure (Record, pp. 290, 291, 315), and the mortgagees were compelled to buy the property, it is clear that any payment now made must come from the corpus of the mortgaged property. The appellant says its lease was prior in time to the mortgages foreclosed. This is true, but immaterial, for the lease was not charged upon, or secured by, any of the property covered by these mortgages, nor did the mortgages in any way infringe the rights of the lessor (Record, pp. 13–18, 237–8).

What the appellant asks is that its claim shall now, for the first time, be given the character of a secured debt and charged as a lien upon the corpus of property long since mortgaged, and that, to its extent, it shall displace those mortgages.

The appellant is not fortunate in its choice of language to explain this pretension. In its brief it says: *Appellant has never claimed a lien, prior or otherwise, upon the property of the Wabash Company* (Appellants' Brief, p. 45).

"While we claim no lien, in the strict sense of that

term, we do insist, as we have always insisted, that this rental, like all other expense incurred by the Receivers, takes precedence of the general mortgage and all other mortgages" (Appellant's Brief, p. 46).

"That we may be clearly understood on this point we repeat what we have stated above; we do consider our claim for rental to be a claim prior to that of any mortgage, just as any expense incurred by the Receivers is a debt to be preferred to the mortgage debt" (Appellant's Brief, p. 47).

"The debt which the Receivers incurred, we do insist, should be paid out of the corpus if the income is insufficient" (Appellant's Brief, p. 48).

In its first petition it is true the appellant did not assert a lien. Indeed that petition was more in the nature of an argument to convince the Court that the Receivers ought to assume the old lease (Record, pp. 8, 10, 11).

But after the Master had found against this petition the appellant magnified its rights. On the 21st of November, 1885, the appellant filed another petition, in which is the following: "Said St. Joseph and St. Louis Railroad Company presents its claim for rentals accrued up to this date, *and asks that they be allowed and declared to be a lien superior in right to the liens of the mortgages securing the bonds referred to in said order*" (Record, p. 193).

Again, on the 7th of August, 1886, the appellant filed another petition, in which it defined its pretensions by the following language: "That the said claim of your petitioner for rent found by the master to be due to it under said lease *constitutes, and in equity ought to constitute, a demand and*

lien against the proceeds of the sale of the said Wabash, St. Louis and Pacific Railroad Company under foreclosure, *and furthermore, that said claim is a lien prior in equity to any claim or lien* of the complainants in this case, or of any bondholders or mortgagees, or other leases or creditors of any kind or nature whatever" (Record, pp. 199, 200).

This part of the record was evidently forgotten when in its brief appellant said, "*appellant has never claimed a lien, prior or otherwise, upon the property of the Wabash Company.*"

But the word of description is of little moment. *What is clear beyond cavil is, that in its petitions and in its brief the appellant claims the right to be paid out of property mortgaged to other parties and never mortgaged to it, and to be paid in preference to the mortgagees.*

II. The appellant could have applied for and obtained its road when the Receivers were appointed, but it elected to leave it in the hands of the Receivers, subject to the terms of the receivership.

(a) It is to support its pretensions to a lien superior to all others that the appellant attempts to convince the Court that its situation was passive, helpless or defenseless, and that it was remediless against the possession of the Receivers.

But the lease, as already shown, gave the appellant the

option to re-enter and end the lease upon default in payment of rental continued for thirty days (Record, p. 47).

The bill filed by the Wabash Company May 27th, 1884, was a declaration of its inability to pay rent, and of its intention not to pay rent (Record, p. 230).

A declaration, in advance of the time for performance, of an intention or purpose not to perform a contract, may be regarded as a breach of the contract upon which the rights of parties at once mature and a cause of action at once accrues.

Hochster vs. De Latour, 20 Eng. L. & Eq. R., 157.
Burtis vs. Thompson, 42 N. Y., 246, p. 250.
Shaw vs. Republic Life Ins. Co., 69 N. Y., 286, p. 293.
Wills vs. Simmonds, 8 Hun, 189.

If the appellant, treating this declaration and action of the lessee as a breach, had forthwith announced its option and applied to the Circuit Court for possession of its property, would the Court have told the appellant to wait until the next rent day, or for the period of thirty days, to see if the bankrupt Wabash Company might not, perhaps, change its mind and pay its rentals? Would the Court not have told the appellant it might at once forfeit the lease and take its road, or might, at its option, leave the road in the hands of the Receivers. And would it not have said, that if the appellant elected to leave its road with the Receivers, it must leave it *not under contract with the Court*, but subject

to such allowances or orders as the Court might see fit to make ?

(b) Again, the lease provides that an assignment of the lease without written consent of the lessor shall work a forfeiture of the lease (Record, p. 18).

The action of the Wabash Company in filing its bill and asking the Court to take charge of all its property was, as the Court has decided, equivalent to a voluntary petition in bankruptcy.

A voluntary assignment in bankruptcy is a breach of a covenant not to assign a lease.

> Wood's Landlord and Tenant, Sec. 324 (p. 534), note 7, and cases there cited.

Upon an assignment contrary to covenant, the landlord may elect whether to treat the lease as void or not. The tenant has no option in the matter.

> *Id.*, Sec. 323 (p. 532).

If, therefore, the appellant had applied for possession of its road immediately upon the appointment of Receivers, on the ground that the covenant not to assign had been broken, it surely would have had the right to insist upon an order for possession. And that the order would have been given is plain from the manner in which the Court did, in fact, treat such application and the language of the Court already quoted with reference to that subject.

(c) But the appellant, having the right to elect, elected not to apply for its road, but to leave it with the Receivers.

This, no doubt, was good policy, since it compelled the Receivers to maintain and operate the road at a loss to the system and a gain for the appellant.

But, having made this election, the appellant was bound to leave its road subject to the orders of the Court, which at that time were that rental might be paid out of income, and only out of income (Record, p. 239).

III. The Special Master correctly found, and the Court correctly decided, that the appellant's claim for rental is an unsecured debt of the Wabash, St. Louis and Pacific Railway Company and not a charge upon the corpus of the receivership property.

(a) The Receivers did not become assignees of the lease.

In the principal brief already filed by the appellees it is shown that chancery Receivers do not take the legal title of leasehold property by entering upon the property, and that the rule for which the appellants have contended is limited to statutory Receivers. It may be properly added that the Receivers Humphreys and Tutt did not enter upon what was described as the leasehold property in the sense contemplated by the decisions which treat such an entry as an election to become assignees of the lease and to adopt its terms. As has already been shown, the Receivers continued to manage this road as part of the Wabash system, because there was no alternative save to abandon the road and

let its operation cease. Such a course, as was pointed out by the Court in the case in 46 Federal Reporter, page 26, cannot properly be treated as a technical entry or as an election to be bound by the terms of the lease.

(b) If the Receivers had entered and had become committed to the terms of the lease, it would not follow that their obligation for rental would become a preferred debt, secured by a lien upon the Wabash lines, superior in right to the mortgages upon those lines.

The counsel for appellants cite numerous cases of liquidation under the English Companies Act and of assignments in bankruptcy, to show that liquidators and assignees who have elected to occupy leased premises must pay the rental therefor "out of the fund" or out of "the assets" of the estate. But what is "the fund," and what are the "assets," in such cases? The meaning of the cases cited is that rental must be preferred to unsecured debts and must be paid before general distribution to unsecured creditors. The fund and the assets are the net proceeds or avails of the estate in liquidation or in bankruptcy; but while that estate would include the equity of mortgaged premises, it would not include the value of property within the limits of valid mortgages or pledges. Suppose, for example, that the assets should consist of a leasehold estate subject to arrears of rental, and mortgaged or pledged property just sufficient, or insufficient, to pay the face of the pledge or mortgage, and not sufficient to extinguish interest accrued thereon. Does any case declare, or can it be successfully

contended, that because a liquidator or an assignee in bankruptcy has become committed to the terms of the lease, he must pay the accrued rental from the proceeds of the mortgaged property, and that while the lessor in this manner gets his rental in full, the pledgee or mortgagee goes without his interest and loses part of the security for his principal? Not only does no case go to this length, but, on the contrary, the tenor of the cases is that the liquidator is as much bound to pay interest where he has occupied mortgaged premises as he is bound to pay rental where he has occupied leased premises.

The citation found at pages 37 and 54 of appellants' brief:

In re Brown, Bailey and Dixon, L. R., 18, Chancery Div., 649,

is exactly this case, where the liquidator of an insolvent mortgagor remained in possession of mortgaged premises, and the mortgagee was allowed to distrain for interest.

Under this authority and according to appellants' argument, the Receivers, Humphreys and Tutt, were bound to treat unpaid interest on the mortgage and the appellants' rental claim, as Receivers' obligations on the same footing. If they could pay rental out of property covered by mortgage to another, they could also pay interest out of property not covered by the mortgage. The fact was that, having no income to pay either, the Court allowed each—lessor and mortgagee—to get what he could from his own property.

It is not contended here that no circumstances can exist under which rental will be charged on the corpus of property held by Receivers. The contention is that rental is not

so charged from the mere circumstances that a Receiver has entered upon or held the leased property, even though he has held it under the terms of the lease.

The term " Receiver's debt " has not yet been strictly defined, but it is certain that all Receivers' obligations are not charged on the corpus of the property so as to displace contract liens or diminish vested rights.

IV. The claim cannot be sustained on the ground that any act of the Receivers or of the mortgagee has already imposed this charge on the corpus of the property.

(a) The Receivers have done no act to commit them to the terms of the lease or to charge them with the rental fixed by its terms. Even if the fact had been that the Receivers had thought it desirable to hold this property, they would have had a reasonable time to make their election. The fact is that before one month had elapsed they applied to the Court for instructions, by a petition which distinctly set forth that they had no income wherewith to pay the rental in question, and the order of the Court, made on that petition, and under which the Receivers thereafter acted, was notice to parties to the suit that the Receivers were not to be bound by the limit of rental prescribed by leases, or, in other words, that they did not elect to adopt the terms of leases. At most, the Receivers did " nothing except abstain

from trying to get rid of the property which the company held as lessee." This is not an "election."

In re Oak Pitts Colliery Co., L. R., 21 Ch. Div., 330.

(b) The Receivers had no power to invest this claim with the character of a preferred claim, or give it security by a charge upon the property in their possession. Such a charge can only be imposed by special authority of the Court. An order to pay operating expenses out of income is plainly insufficient. The Receiver cannot himself charge the corpus of the property; he is closely restricted to the income and profits.

Beach on Receivers, Sec. 377, and cases there cited.

(c) The appellant insists that the mortgagee once admitted that the Receivers entered under the lease. This was an admission in an answer to one of the appellant's petitions. It could not bind the Receivers. Nor is it necessary now to consider what might have been its effect in dispensing with proofs. The fact is, that the proofs were not dispensed with, but were made; and the proofs are controlling.

V. The claim cannot be sustained on the ground that any act or order of the Court has made it a charge upon the corpus of the property in preference to existing liens.

(a) The appellants have contended that the order of May

27, 1884, was an absolute and unqualified promise by the Court that their claim should be paid. In support of this contention they quote some words of the order. But the order, when correctly read, is found to be in terms *an order for payment out of income only.*

(b) The order of June 28th, 1884, which approved the Master's Report upon the Receiver's petition of June 26th, was a distinct declaration that while each separate line of road was accorded the right to have its account of earnings and expenses separately kept, yet the expenses of one line should not be paid from the earnings of another, and is a sufficient repudiation of the suggestion that the appellant had a right to rely on payment by the Receivers under order of the Court.

The declarations of the Court in its opinion delivered October 15th, 1884, were in the same line as the decision of June 28th, and emphasized that decision.

(c) The appellants in argument and in briefs have treated the order and decision of April 16th, 1885, as a declaration that while rental would not be paid upon this line unless earned by it, yet that the Court would not permit the cancellation of the lease, but would continue to hold and operate the line.

The appellants argue that the Receivers' application was in terms for the cancellation of certain leases, and that the Court, instead of ordering their cancellation, said it would

continue to operate the roads. The record shows that the language of the Court is:

"While the Court will continue to operate such subdi-
"vision *until some application be made*, yet the right of a
"lessor or mortgagee, whose rent or interest is unpaid, to
"insist upon possession or foreclosure, will be promptly rec-
"ognized."

The fair construction of this decision is that the Court declined to cancel leases *on the application of the lessee without the consent of the lessor*. This was right, because, obviously, when the lessee defaults upon his rent, it is not his privilege also to repudiate the lease, but the right to do so, or not to do so, belongs to the lessor. The Court declared that it would continue to operate such subdivision "*until some application be made*," and this declaration was wholly in the interest of the lessor companies. In this respect the gist of the decision is that the Court will not relieve a defaulting lessee (the Wabash Company) from the obligations of the lease without the consent of the lessor, and will not allow the Receivers to cease operating roads which must be kept running in the interest of the public; but that whenever the lessor prefers to take charge of the leased property, rather than to leave it in the hands of the Receivers, his right to do so will be promptly recognized.

VI. In this case none of the grounds exist which have been recognized by courts of equity as sufficient to charge the corpus of receivership property and displace or defer mortgage liens thereon.

(a) The grounds upon which courts of equity have imposed certain obligations of Receivers upon the corpus of property, and have postponed to such claims the rights of lien creditors, are, in substance, either that earnings applicable to the payment of such claims have been diverted to some other channel; or that the claims have originated in operations conducted under the orders of the Court for the protection and preservation of the property in its charge; or that the mortgagees, to whose rights such claims have been preferred, have assented to the preference and have expressly or by implication asked the Court to allow it.

Burnham vs. Bowen, 111 U. S., 776.
Wallace vs. Loomis, 97 U. S., 146.
Kneeland vs. Am. Loan & T. Co., 136 U. S., 89.

(b) Neither ground exists in this case. The rental of the appellant had been paid up to and including March 1st, 1884. During the same period an immense floating debt for supplies and other claims of a preferential character had accrued. The inference is that, if there was any diversion, it was a diversion of funds from the payment of supply claims to the payment of rental claims on this road which did not earn its rental. Again, the rental charge here claimed was not an expense originated by the Court in the process of administration, like the Receivers' salary, for example. Nor was this road operated for the protection or advantage of the other lines. The Court took the property as it found it and maintained and operated it for the benefit of the lessor until the lessor

was prepared to take it. As soon as the lessor was ready to take it, the Court ordered its surrender. Meantime the property was operated at a net loss to the Receivers and was not charged with any portion of the Receivers' debt. It is claimed in the appellants' argument that this rental was an operating expense. An operating expense would naturally cease when operation ceased. But rental under a lease would go on whether the leased property were operated or allowed to lie idle. The rental was in no correct sense an operating expense, and such was the decision of the Court in 46 Federal Reporter, page 26.

The record shows that the mortgagees did not, expressly or impliedly, consent to have this rental claim charged upon the property in preference to their mortgages. The Receivers were not appointed at their instance. Their application to have the receivership extended to their mortgage was denied. The Court expressly held that the Receiver was acting as the arm of the Court, not in the interest of any party, but for all parties. It is the very reverse of the case where a mortgagee of real estate has asked to have Receivers take charge of the real estate, and also of leased personal property used in connection with and for the benefit of the real estate.

VII. The appellants' argument that this claim is entitled to priority as "a receivership debt," is not well founded.

(a) The counsel for appellants maintain that, if this debt

is a Receiver's debt, then of necessity it becomes a charge upon the corpus of the property, if income for its payment is lacking. This, it is submitted, depends upon the question *what kind of Receiver's debt or Receiver's obligation is the claim.* It is true that Receiver's debts of the class originated under orders of the Court for the protection and preservation of the fund in charge of the Court, have this preferential character. But there are many Receiver's obligations which have not such a preference. Whether they should be called "Receiver's debts" or "Receiver's obligations" is a question of terms which, perhaps, has not been distinctly answered by any adjudicated case. In the case of

St. Louis, Alton and Terre Haute Railroad Company vs. Cleveland, C., C. and I. Railroad Co., 125 U. S. Rep., 658, p. 668,

it is held that the rule charging operating expenses on gross income in preference to mortgage interest, does not apply to the fund realized from the sale of the road, and that, as a general rule, the mortgage debts take precedence.

The case of

Illinois Midland Railroad Co. vs. Union Trust Co., 117 U. S. Rep., p. 434,

was to some extent devoted to the classification of Receiver's obligations, and it was there held that two items ($54,900 and $32,000) might be allowed as *indebtedness contracted by the Receivers,* but were subordinate to the mortgage bonds.

It is familiar practice to classify Receivers' debts; and